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Supreme Court, U.S.
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**No.**

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IN THE

# Supreme Court of the United States

INTERNATIONAL CUSTOMS ASSOCIATES, INC.,
and LESLIE L. BOROS,
*Petitioners,*

*v.*

FORD MOTOR COMPANY, AND FORD LIO HO
MOTOR CO., LIMITED (TAIWAN),
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the district court had personal jurisdiction over the respondents Ford and Lio Ho?

2. Whether the courts below are correct that respondent Lio Ho's telephone contacts with New York were not sufficient to support jurisdiction, or whether Lio Ho through its agent entered the forum to transact business there and thus became subject to the jurisdiction of the courts of New York, and that the agent has as much right to claim that jurisdiction as any third party?

3. Whether, at a special hearing held to determine jurisdiction, pursuant to respondent Ford's motion for summary judgment, the district court judge is permitted to go beyond the question of jurisdiction, and issue summary judgment dismissing petitioners' claims although there were genuine issues as to material facts in dispute, or whether petitioners still have their right to a jury trial and to due process under the Constitution of the United States?

4. Whether the judge of the court abused his discretion in avoiding discussion of petitioners' allegation of fraud raised both in its response papers to respondent's motion for summary judgment, and at an oral hearing, or whether the judge should have taken the position that an oral hearing on a motion for summary judgment is still a proper forum in which to hear the facts alleged in support of a claim of fraud?

## LIST OF PARTIES

The caption contains the names of all parties to the proceeding

## CORPORATE DISCLOSURE STATEMENT

International Customs Associates, Inc., had no parent company, nor was there any publicly held company that owned any percentage of the corporation's stock. It had no subsidiary. It is presently bankrupt and dissolved.

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---

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
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# PETITION FOR WRIT OF CERTIORARI

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Petitioner respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, decided on December 29th, 1999.

## STATEMENT OF OPINIONS BELOW

On August 1, 1995, District Court Judge John G. Koeltl dismissed the case against Ford Lio Ho Motor Co., Ltd. (Taiwan), located in Chung Li, Taiwan (hereafter "Lio Ho") under Rule 12(b)(2) of the Federal Rules of Civil Procedure on the ground that the Court did not have personal jurisdiction over Lio Ho. *International Customs Assoc., Inc. v. Ford Motor Co.*, 893 F. Supp. 1251, 1259 (S.D.N.Y. 1995). The basis for federal jurisdiction in that case was diversity of citizenship.

On September 20, 1996, Judge Koeltl denied the renewed motion to dismiss of defendant Ford Motor Company, located in Dearborn, Michigan (hereafter "Ford") pending receipt of proof of governing Taiwanese law that the parent company (Ford) can be sued in Taiwanese Court for the breach of a contract signed only by the subsidiary (Lio Ho).

On April 23, 1999, District Court Judge Alvin Hellerstein, at a hearing on defendant Ford's motion for summary judgment, dismissed the case against Ford under Rule 56 of the Federal Rules of Civil Procedure on the ground that the court did not have personal jurisdiction over Ford., in an unreported decision *International Customs Assoc., Inc. v. Ford Motor Co.*, No. 94-CV 7173 (AKH) (S.D.N.Y. April 23, 1999).

On December 29, 1999, the Second Circuit Court of Appeals, in *International Customs Assoc., Inc. v. Ford Motor Co.*, No. 99-7644 (2nd Cir. Dec. 29, 1999), affirmed the decisions of Judges Koeltl and Hellerstein for the reasons stated in *International Customs Assoc., Inc. v. Ford Motor Co.*, 893 F. Supp. 1251, 1259 (S.D.N.Y. 1995), and in *International Customs Assoc., Inc. v. Ford Motor Co.*, No. 94-CV 7173 (AKH) (S.D.N.Y. April 23, 1999). The Second Circuit denied the motions for Taiwanese counsel's *pro hac vice* oral argument and offer of proof. All opinions are annexed to this petition.

## JURISDICTION

The order of the Court of Appeals was filed on December 29, 1999, and this petition for a writ of certiorari is being filed within ninety (90) days thereof.

This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Amendments V and VII
28 U.S.C. §1254(1)
Fed. R. Civ. P. 12(b)(2), 15(a) and (b),
and 56(c)
N.Y. CPLR § 302(a)
The text is supplied verbatim in Appendix F.

## STATEMENT OF THE CASE

On October 3, 1994, Plaintiffs, International Customs Associates ("ICA") and Leslie L. Boros ("Boros"), sued the Defendants, Ford Motor Company ("Ford") and its 70% owned and controlled Foreign Investment Approved ("FIA") Taiwanese subsidiary, Ford Lio Ho Motor Company, Limited (Taiwan) ("Lio Ho"), for breach of contract in Federal District Court for the Southern District of New York.

On August 1, 1986, President Reagan issued a Memorandum to the U.S. Trade Representative asserting that the United States would retaliate against Taiwan for Taiwan's failure to conform to its agreements re: international trade relations with the United States under GATT. Appendix D-1.

On August 6, 1986, Boros wrote to the CFO of Ford in Dearborn, Michigan, and warned Ford that the Taiwanese Customs Service was going to "upwardly revalue", or raise the appraised value of the automobiles that Ford was shipping to Lio Ho from the U.S., Japan, and Germany. Thus duty costs were about to go up significantly. Boros offered the services of his company ICA to prevent this uplift in duty costs, and also in addition to get a reduction in the duties then being paid by Ford in Taiwan on the imports. Appendix D-2.

At first Ford declined, but when Boros' warnings were seconded by Ford's Taiwanese lawyers, Ford told Boros that ICA was retained and to prepare a contract, which Boros did. Ford negotiated the contract, but insisted that Boros go to Taiwan and finish the contract there with Ford executives in control of Lio Ho, and sign the contract with Lio Ho, not Ford. At Ford's request, in March 1987 Boros and Irvin (an ICA associate) went to Taiwan where they met privately I. M. Inglis, Ford's Director of Finance & Administration at Ford Lio Ho. However, the Chinese executives of Lio Ho, including the Chairman of the Board, did not attend that meeting, because Ford did not invite them. The reason Ford gave for the change in parties on the contract was that it was wrong from a public relations view for Ford to be seen in Taiwan as pressuring the Taiwanese government. Boros complied and agreed that the contract would be signed with Lio Ho not Ford.

Ford executives at Lio Ho, and Ford executives at Ford Michigan, and ICA negotiated, and on February 27, 1988, Lio Ho and ICA executed a "Consulting Agreement for Customs Services" in which Ford's Policy Letter, C-3, regarding

"Standards of Corporate Conduct," was included. In paragraph ten, the parties agreed that "[t]his agreement shall be governed by the laws of the State of New York." Hexter, on behalf of Ford, signed the contract which had "J. G. Auton, President" as the signature block. In essence, the consulting agreement appointed ICA as Lio Ho's agent in New York to represent Lio Ho to U.S. authorities, to research law, accumulate data, interview U.S. government officers, and prepare drafts of appeals to the Taiwanese Government that ICA could present, or that Lio Ho could present, and set ICA's fees on a contingency basis.

When Taiwanese Customs began to implement the upward revaluation, Ford requested Boros to go immediately to Taiwan and prevent the increase in duties. Boros and the ICA staff were successful in preventing the upward revaluation. However, Ford refused to pay ICA, claiming that it wasn't sure that the Taiwanese government would not reverse its favorable decision. Then Ford requested Boros to continue working to accomplish the reduction in current duties. The ICA staff was able to do this. See, Lio Ho letter of December 9, 1986, to the Taiwanese Government, attached in Appendix D-3, stating that ICA was Ford's consultants. Also, See, ICA letter of December 14, 1988, to the Taiwanese Government, attached in Appendix D-4, in which Boros states the terms of the agreement ICA had negotiated with the Taiwanese Government, namely, that if Ford reduced the intercompany prices on its invoices to the lower computed value amount the Government of Taiwan would accept that price as the value on which duty would be charged (which would consequently reduce the amount of duty Ford had to pay).

To get permission to keep the intercompany prices high while enjoying use of the lower computed values, Ford asked

Boros to prepare further appeals. In those several years Boros and his ICA associates worked in New York on developing the original presentation to the Taiwan Customs Administration which comprised 150 pages, and the various later appeals Ford requested. Altogether, ICA associates and consultants spent about 3,700 hours combined on the project in New York, and about 20 hours meeting twice in person with Taiwanese officials in Taiwan. This work in New York included representing to U.S. Government officials Ford's and Lio Ho's need for help to get just treatment in Taiwan, and soliciting and receiving the support and assistance of U.S. Customs officials in New York, and U.S. Customs, U.S. Department of Commerce and U.S. Trade Representative's Office officials in Washington. At that time President Reagan was adamant in persuading the Taiwanese Government to adopt GATT procedures. Therefore, the U.S. Government officials, when they were told the work was to help Ford, were eager to help ICA get GATT treatment for Ford.

It was this U.S. Customs assistance that Lio Ho and Ford purposefully sought in New York--assistance that was not available to Ford elsewhere. The work in New York not only included research in international law in New York and meetings with U.S. Customs officials, but analysis in New York of accounting and operations records supplied to ICA by Ford from Dearborn, Michigan. These proprietary records were for the U.S. cars that Ford exported to Lio Ho, and for the cars that Ford of Europe exported to Lio Ho, and included the intercompany prices, number of cars shipped, etc. There was a lot of number crunching in New York of Ford's business dealings preparatory to issuing the appeal documents. The Ford executives in Michigan participated fully in assisting in the creation of the accounting and operations documents that could be submitted to the Government of Taiwan.

During October 1988 – July 1990, Ford executives at Lio Ho, Gary Hexter and Neil C. Longhurst, Ford's planning and analysis international expert, who was Director, New Business Development & Planning at Ford Lio Ho, telefaxed to ICA more than 500 pages of drafts of Lio Ho's letters, protests, and drafts of several successive appeals under Hexter's signature to the Taiwanese Customs Headquarters and Ministry of Finance. Lio Ho repeatedly sent messages to ICA in New York requesting ICA to obtain from U.S. Customs New York National Headquarters officials further laws, rulings, regulations, advice and exemplars as to how U.S. Customs values automobiles imported into the U.S. and how U.S. Customs uses the "computed value" method of appraisement. Lio Ho also requested to receive other documents and information from government officials in Washington, D.C. Lio Ho supervised all these missions it allocated to ICA. In all its contacts with U.S. Government offices, ICA explicitly stated they represented Ford and Lio Ho, and requested assistance for their principals.

However, as time passed, Ford still refused to lower its intercompany invoice prices on the imported cars. Then Ford breached the contract and discharged ICA and Boros. See, letter from Daniel at Lio Ho to Boros dated November 26, 1990, copy in Appendix D-5. in which it said: "Ford management [meaning Ford executives in Dearborn] has decided not to take any further action on the Sable customs claim, and that ICA should cease any further work, effective immediately." [The Sable car had been chosen as the sample car for the duty reduction appeal.]

Ford averred to ICA that it was giving up any claims to the lowest duty values, as it refused to lower its intercompany prices. However, years later, in 1998, during discovery in this suit, ICA discovered from documents supplied by Ford, that contrary to its holding forth Ford had immediately after discharging ICA reduced its intercompany prices to the lower "computed values" thus gaining an enormous duty reduction. Ford's hiding this change of practice defrauded ICA of the contingency fees due to ICA for negotiating the agreement with Taiwan Customs that if Ford reduced its intercompany prices, Taiwan would appraise at those lower prices. So, in total, Ford reneged on its promise to pay ICA its fees both for avoiding the upward revaluation of prices, and for lowering the intercompany prices.

Evidence of the fraud is shown on extracts of three typical Ford price memos, attached in Appendix D-6. [D-6-1, -2,-3]. Memo 1, dated Aug. 30, 1988, shows a sale price from Ford to Lio Ho of the Scorpio at DM 21,316.81, and of the Sierra Ghia at DM 16, 154.16, but on Memo 2, dated July 27, 1992, the sale price from Ford to Lio Ho of the Scorpio is lower at DM 17,092.16, and on Memo 3, dated March 1, 1991, the sale price from Ford to Lio Ho of the Sierra Ghia is lower at DM 13,677.00. The intercompany prices are considerably reduced on the cars imported into Taiwan after ICA was fired, showing that Ford, despite what it said to the contrary, after it fired ICA did take advantage of the duty reduction agreement that Boros had negotiated with the Taiwanese Government.

On August 1, 1995, District Court Judge John G. Koeltl dismissed the case against Lio Ho, under Rule 12(b)(2) of the Federal Rules of Civil Procedure, on the ground that the Court did not have personal jurisdiction over Lio Ho. *International Customs Assoc., Inc. v. Ford Motor Co.*, 893 F. Supp. 1251, 1259 (S.D.N.Y. 1995). The Court based its decision on the fact that Lio Ho never physically entered New York State, and that the contract was signed in Taiwan, not New York.

On September 20, 1996, Judge Koeltl denied Ford's renewed motion to dismiss, pending receipt of information on governing Taiwanese law. He ruled that, under the choice of New York law in the contract, he was required—under New York diversity rules—to apply the law of the jurisdiction in which Lio Ho was incorporated, Taiwan, in applying the twin doctrines of "alter ego" and "piercing the corporate veil." He affirmed that if these doctrines existed in Taiwan, and jurisdiction over Ford was possible on these grounds in Taiwan, then jurisdiction over Ford in New York would be recognized.

On April 23, 1999, District Court Judge Alvin K. Hellerstein, sitting to decide if a suit brought in Taiwan on the theory of alter ego, or piercing the corporate veil, would lie against Ford, reviewed two affidavits on Taiwanese law, one filed by Taiwanese counsel retained by ICA, and one by Taiwanese counsel retained by Ford. Judge Hellerstein noted that Mr. Lee, Ford's Taiwanese lawyer, was in agreement with ICA's Taiwanese lawyer that under Taiwan Company Law the parent corporation can be sued in Taiwanese Court, if the parent corporation or its representatives that manage, control or direct the affairs and operations of the Taiwanese subsidiary commit the wrong. He ruled that under Taiwanese law ICA could get jurisdiction over Ford in Taiwan. Then, based solely on defendant's lawyer's affidavit and rejecting ICA's lawyers affidavit, Judge Hellerstein decided as fact, contrary to the claim of petitioners, that Auton, Hexter, Inglis, Longhurst and Daniel were not Ford's agents, placed as executives and directors to manage, control and administer, as Ford's representatives, the Lio Ho facilities. Rather, Judge Hellerstein asserted, in agreement with Mr. Lee, that the Ford executives at Lio Ho were merely Lio Ho's employees in Taiwan and only represented Lio Ho, and did not represent Ford at all. These findings of fact were based on the presumption that employees only represent their employers. ICA asserted it knew these parties worked for Ford and took orders from Ford, and were Ford's agents. ICA asserted that Lio Ho was an "FIA" subsidiary of Ford, and only under the *Statute for Investment by Foreign Nationals* was Ford permitted to have the President and the Director of Finance & Administration as non-Taiwanese nationals to manage, control, direct and administer Lio Ho, the Taiwanese subsidiary, and to sign contracts. Therefore, as required by Taiwanese law, these Lio Ho executives were registered officially as representatives of Ford, and their legal status in Taiwan was as agents of Ford. In this manner, by law, foreign corporations in Taiwan are held strictly liable for wrongs committed by their subsidiary. However, Judge Hellerstein then and there himself decided these disputed issues of fact in Ford's favor, instead of letting the jury decide them at trial. He made a finding of fact that Auton, Hexter, Inglis, Longhurst and Daniel were merely Lio Ho's hired employees who worked solely for Lio Ho. Accordingly, Judge Hellerstein found that Ford was not a party to the contract, and not a party to the breach of the contract, and therefore not a proper defendant, and under rule 56 Fed. R. Civ. P. dismissed ICA's case against Ford. *International Customs Associates, Inc. v. Ford Motor Co.*, No. 94-Civ. 7173 (AKH) (S.D.N.Y. April 23, 1999).

## REASONS FOR GRANTING THE WRIT

The writ should be granted because the decision of the Court of Appeals for the Second Circuit (1) conflicts with the decisions of other Circuits and the Supreme Court on (a) the rules for determining the existence of jurisdiction, and (b) the rules for when it is appropriate to pierce the corporate veil, and

(2) is non-responsive to rules 15(a) and (b), and 56(c) of the Federal Rules of Civil Procedure.

## ARGUMENT

### I THE WRIT SHOULD BE GRANTED TO CORRECT THE SECOND CIRCUIT'S METHOD OF DETERMINING IF IT HAS JURISDICTION OVER FOREIGN CORPORATIONS THAT HAVE NOT PHYSICALLY ENTERED THE FORUM, WHICH METHOD IS IN CONFLICT WITH THE METHOD OF OTHER CIRCUITS AND THE SUPREME COURT

#### *The law regarding jurisdiction over Lio Ho*

The amenability of a foreign corporation or a party without the State to suit in a federal court in a diversity action is determined in accordance with the law of the state where the court sits. *Cutco Indus., Inc. v. Naughton*, 806 F.2d 361, 364 (2d Cir. 1986). The New York long-arm statute, Sec. 302(a)(1) of the CPLR, permits a court to exercise jurisdiction over a non-domiciliary defendant if 1) the defendant "transacts any business" in New York, and 2) the cause of action arises out of that business activity, such that an "articulable nexus" exists between them. Id. at 365.

A defendant transacts business in New York when he "purposefully avails" himself of the privilege of conducting business there, thus invoking the benefits and protections of New York law. Id. at 365 (citing *McKee Elec. Co. v. Rauland-Borg. Corp.*, 20 N.Y.2d 377, 382 (1967). "Transacting business" "has been interpreted to require a certain quality, rather than a specific quantity, of contacts with New York." *QRS 10-12, Inc. v. Calcomp Technology, Inc.*, 1999 U.S. Dist.

LEXIS 10261 (S.D.N.Y. July 8, 1999); *Pray v. Oughtred & Harrison*, 1999 U.S. Dist. LEXIS 5287, *6, 199 (S.D.N.Y. March 26, 1999); *Broad Horizons, Inc. v. Central Crude Ltd.*, 1994 U.S. Dist. LEXIS 16045 (S.D.N.Y. Nov. 9, 1994). However, the courts below rely entirely on the physical entry of the principal into the State, and the place of physically signing the contract, as its criteria for personal jurisdiction.

*Lio Ho can be sued in New York*

In the contract, the parties selected New York as the choice of law. *Cutco*, 806 F.2d at 366-67 (it is appropriate to give "some weight" to a choice of law provision).

Despite Lio Ho's involvement as an adviser to Ford, the contract negotiations occurred wholly in the United States, between Ford in Michigan, and ICA, in New York. Two different Directors of Finance at Lio Ho, Martin Inglis and Gary Hexter, told ICA that only general counsel at Ford's World Headquarters [WHQ] in Dearborn, Michigan, could negotiate the contract. Appendix D-7. The existence of the verbal contract with Ford was entirely discounted by the courts below.

It is not important that, after these negotiations, Lio Ho executed the contract in Taiwan, and ICA in New York. See *Agency Rent-A-Car System., Inc. v. Grand Rent-a-Car Corp.*, 98 F.3d 25 (2d Cir. 1996) at 30-31 ("we question whether, in an age of e-mail and teleconferencing, the absence of actual personal visits to the forum is any longer of critical consequence"); *Hoffritz for Cutlery, Inc. v. Amajac, Ltd.*, 763 F.2d 55, 60 (2d Cir. 1985) ("It is unnecessary that final negotiations or indeed execution of the contract to take place in New York" for a New York court to sustain personal jurisdiction). It is not important that these contacts were mainly by telephone and telefax. The Supreme Court has ruled that telephone and telefax contacts between a party without the state and a party within the state are sufficient to give the courts of the State jurisdiction over the foreign party. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). In that case, the Supreme Court stated:

> "Thus where the defendant 'deliberately' has [471 U.S. 462, 476 (1985)] engaged in significant activities within a state, *Keeton v. Hustler Magazine, Inc.*, *supra*, at 781, or has created 'continuing obligations' (emphasis supplied) between himself and residents of the forum. *Travelers Health Assn. v. Virginia*, 339 U.S., at 648, he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by "the benefits and protections" of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well. Jurisdiction in these circumstances may not be avoided merely because the defendant did not physically enter the forum State.... (Emphasis supplied). It is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines. . . ."

Therefore, the judgment of the courts below on this issue directly contradicts the position taken by the Supreme Court.

Again, in *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957), the Supreme Court stated:

> "With the increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. . . . It is sufficient for purposes of due process that the suit was based on a contract with substantial connection with that State."

The prescience of the Court is remarkable: one only need to substitute the words: "international boundaries" for the words "state lines" to make these cases exactly applicable to the present case. Under the reasoning of the Supreme court, Lio Ho can be sued in New York. The courts below do not agree.

*The district court misapprehended the contract*

A further factor that was ignored, was that the performance of the contract in the state hinged on the active participation of the foreign entity in the work process. The district court stated that it was sure that a substantial part of the performance under the contract was to occur in Taiwan because ICA was to represent Lio Ho before Taiwanese Customs authorities for the purpose of obtaining lower Taiwanese duty rate classifications and lower dutiable values on Lio Ho's products. Additionally, the court stated that it believed that the contract was centered around activities occurring in Taiwan because ICA was to be paid a contingent fee to be determined on the basis of reductions it obtained in the duty rates, dutiable value and import duty taxes of Taiwan. *International Customs Associates, Inc. v. Ford Motor Company*, 893 F. Supp. 1251, 1262 (S.D.N.Y. 1995).

These assumptions are both incorrect. The contract was performed, and almost fully discharged, by ICA, and by Lio Ho working together with ICA, in New York, not Taiwan. ICA's task was to persuade Taiwanese Government officials to comply with the GATT and US Customs methodology in valuing for Customs purposes the Ford cars. However, the work to accomplish this task was performed by ICA in New York, under the control of Lio Ho, and not in Taiwan. Also, since ICA was working on a contingency basis, if the work in

New York was inadequate there would be no savings in Taiwan for Ford, and no fees for ICA. The adequacy of the work in New York was the crucial element, not where the reductions were experienced. In the modern economy, under the flag of free trade, the place of performance of a contract can be and often is, located in a different country than the place of effect of the contract. The court erred in applying out of date notions of trade to the very modern trade opportunities that ICA offered to Ford.

Additionally, it has been shown that Lio Ho participated in the performance of the contract in New York. Thus the district courts exception to the application of the holding in *Broad Horizons, Inc. v. Central Crude Ltd.*, No. 94 Civ. 1593, 1994 WL 623075 (S.D.N.Y. Nov. 9, 1994), is without merit. The contacts between Lio Ho and ICA were not, as the court held, "merely a 'conduit to establish a contract[,]'" and not the transaction itself. . . ." The contacts between Lio Ho and ICA were indeed of the essence of the performance of the contract itself, the essence of the transaction, as between principal and agent. Therefore, the communications between Lio Ho and ICA were sufficient to establish jurisdiction, under the criteria in *Broad Horizons*. (Transcript pages 80, 81) The same is true of Ford, that not only negotiated the contract by telephone and fax with ICA in New York, but over a two year period supplied from Michigan to ICA in New York its own confidential business records, details of shipments, methods of setting intercompany prices, sales and receipts, with regard to shipments of Ford cars to Lio Ho in Taiwan from the US and from other countries such as Germany, and aided ICA actively during that period of time by communications back and forth in interpreting and reformulating those records into legal arguments to be made to Taiwanese Customs.

### *Jurisdiction over Lio Ho comports with due process*

Under the minimum contacts analysis, a defendant must have "purposefully availed" itself of the privilege of conducting activities within the forum state. This requirement ensures that the defendant will reasonably anticipate being haled into court in the forum state. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). A defendant must have enough minimum contacts with the forum state so that maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *PDK Labs, Inc. v. Friedlander*, 103 F.3d 1105, 1110 (2d Cir. 1997)(quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

In contracting with ICA, a New York Corporation, and directing it to perform the bulk of its work-product in New York and to obtain in New York the assistance of U.S. Customs New York officials, and by aiding and supervising that effort over a long period of time, using ICA as their agent, Ford and Lio Ho purposefully availed itself of the privilege and benefit of conducting business in New York through and with ICA. *Id.* at 1110-1111 (citing *Agency Rent-A-Car*, 98 F.3d at 32). After all this, Ford and Lio Ho could reasonably anticipate that, in the event of a dispute, it could be haled into a court in New York. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985)(quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). This is particularly true since the contract designated the laws of the State of New York to govern in case of dispute.

Regarding jurisdiction of an agent over its foreign corporation principal, the courts below followed a rule of law that basically amounts to this: if a domestic agent wishes to sue its foreign principal, but if the principal has not physically entered the State, the agent cannot get jurisdiction over the principal. This rule is discriminatory. By it a whole class of business people--namely agents--are deprived of any recourse against their principal if this rule of law is followed. It is well recognized that if the principal enters the forum by means of an agent, that third parties can obtain jurisdiction over the principal due to its presence via the agent, even if the principal has never personally entered the forum. However, under the rule proposed by the courts below, in the same circumstances the agent of that principal cannot get jurisdiction over its principal because in the relation between the principal and the agent, the principal never entered the state. The better rule is that once a principal enters a state by means of an agent, the agent , like any third party, can obtain jurisdiction over the principal. Fortunately, the Supreme Court has held that, given the right set of facts, telephone, telefax, or mail contact can insert the foreign corporation into the forum. This is a rule with which the courts below are in conflict. The creation of an agency in the state is such a fact. This rule should be applied in this instance, and the lower court reversed. Petitioner did its work for Lio Ho in New York, under Lio Ho's knowing direction and control, as Lio Ho's agent in New York, and therefore the Court should determine that it has jurisdiction over Lio Ho. Petitioner prays this Court to order that petitioner has personal jurisdiction over Lio Ho, and that the case should proceed to trial.

Another reason for personal jurisdiction over Lio Ho is that petitioners can only obtain convenient and effective relief in New York. Requiring the petitioners to sue in Taiwan would be fundamentally unfair. It is impossible. A suit in Taiwan would require ICA and Boros, who did the work nearly exclusively in New York, to try this case abroad, in a foreign language, at great expense in travel, lodging and translators.

All documents must be written in the Chinese language. Jury trial is not available in Taiwan, and Taiwan is not a signatory to the Hague Convention for civilized judicial discovery and deposition. For ICA to file a lawsuit in Taiwanese court against Ford and/or Lio Ho, ICA would have to pay a non-refundable Court Fee of 1% of the amount claimed, plus 5% interest per year (in 1994 that was a Court Fee of US$192,000), and retain only Taiwanese lawyers (who are not permitted to work on a contingency fee basis), and not have the use of U.S. lawyers (non-Chinese lawyers are not permitted to practice or represent clients before the Taiwanese court). The time, cost and difficulty of such a suit makes Taiwan an unfeasible forum, and makes Lio Ho and Ford judgment-proof defendants. See, affidavit of attorney, Appendix E.

*The law of Taiwan provides that both Ford and Lio Ho should be subject to jurisdiction in New York*

Article 6 of the Taiwan statute, entitled "*Law Governing the Application of Laws to Civil Matters Involving Foreign Elements*, Promulgated and enforced on June 6, 1953", sets forth the law of Taiwan on jurisdiction. Appendix D-8. It provides that first, *the intention of the parties shall control*. In this case, Lio Ho and ICA explicitly provided that the law of New York should apply, and it would. It provides secondly, that *If no intention is expressed, the law of the common country of nationality shall apply*. As both Ford and ICA are U.S. nationals, that would mean the law of the U.S. would apply, presumably the law of New York. Petitioners argue that since Taiwan is not a proper forum, because of the limitations in its legal system, perhaps no U.S. court should try to import the Taiwanese law regarding jurisdiction, but if we do consult the Taiwanese law, it provides for the law of New York to apply in this law suit both as to jurisdiction and as to the merits.

## II THE WRIT SHOULD BE GRANTED TO CORRECT THE SECOND CIRCUIT'S UNDERSTANDING OF WHEN TO PIERCE THE CORPORATE VEIL, AND HOW TO APPLY THE RULES OF THE COURT REGARDING: ALLOWING AMENDMENTS TO PLEADINGS, AND REGARDING DISMISSING CASES ON SUMMARY JUDGMENT, AS ITS VIEWS ON THESE MATTERS ARE IN CONFLICT WITH THE APPROACH OF OTHER CIRCUITS AND THE SUPREME COURT

### *The law regarding jurisdiction over Ford*

The above remarks regarding jurisdiction over Lio Ho apply equally to jurisdiction over Ford, and are incorporated herein by reference.

### *The district court erred when it made findings of material facts in a summary judgment proceeding*

The court noted that ICA claimed that Ford was liable on the theory of alter ego, or piercing the corporate veil. Since Ford's signature is not on the contract, the burden is on petitioner to show that Ford and Lio Ho were one economic entity, that the non-Taiwanese executives of Lio Ho were employees, representatives, and agents of Ford, and took orders from Ford which made all the decisions, and reported back to Ford how they had carried out Ford's orders. Ford disputed ICA's statement of the facts. Petitioner is prepared to prove these facts to a jury. For instance, in a letter dated Dec. 23, 1988, to Taiwanese Customs, Hexter states on behalf of Lio Ho on page 3 that Ford controls and restricts the resale by Lio Ho of the cars it buys from Ford. Appendix D-9. This shows such excessive control over and interference with the subsidiary that the parent must be judged to be one economic entity with the subsidiary. However, Judge Hellerstein determined from the bench this and other issues of material fact disputed by the parties, without submitting the issues to a jury.

A judge must not determine disputed material facts in a summary judgment proceeding. Summary judgment, grantable under Sec. 56 of the Federal Rules of Civil Procedure Rule, may be rendered only if the record shows there is no genuine issue as to any material fact. Fed. R. Civ. P. 56(c). In this case the parties agreed on almost nothing. In granting summary judgment when facts were in dispute, the courts below were not responsive to the controlling rules of procedure.

The result is the same under federal case law. In a case before the U.S. Court of Appeals for the Federal Circuit, *Ford Motor Company, v. United States*, No. 98-1066 (Fed. Cir. September 14, 1998), involving a fraud investigation of Ford by the U.S. Customs Service, wherein a Ford executive prepared improper information for submission to the U.S. Customs Service, depriving the government of customs duties in amount approximately $5.4 million, the Federal Circuit Court held that the lower court erred in granting summary judgment to Customs, when there existed disputed issues of material fact. The appellate court spoke as follows:

> "This court reviews a grant of summary judgment without deference. See Wolff Shoe Co. v. United States, 141 F.3d. 1116, 1121 (Fed. Cir. 1998). In other words, this court reapplies the same legal standard as the trial court to the same record that was before that court. See id. Summary judgment is appropriate when the record shows "no genuine issue as to any material fact" and entitlement of the moving party "to

judgment as a matter of law." U.S. Ct. Int'l Trade R. 56(d). On summary judgment, the courts resolve all reasonable inferences in favor of the nonmoving party. See United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). Due to the nature of the proceeding, courts do not make findings of fact on summary judgment. See Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1986) ("[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Ford.* No. 98-1066 at 8. The district court and appellate court below are in direct conflict not only with the Federal Circuit, but with the Supreme Court, on whose rulings the Federal Circuit relied.

The same result obtains under New York State law. The case we cite is especially instructive as it involves a foreign parent corporation (principal) not physically present in the forum which has its subsidiary in the forum execute the contract with plaintiff (agent) in its stead, and then when the parent breaches the contract with agent it defends on the basis that it neither signed the written contract nor is it named as a party therein. *A.W. Fiur Co., Inc., v. Ataka & Co., LTD., and Ataka America, Inc.*, 422 N.Y.S.2d 419, 71 A.D.2d 370 (1979). The fact situation is quite parallel. The lower court dismissed the case on defendant's motion for summary judgment. The Supreme Court, Appellate Division, First Department, reversed the dismissal, and also granted plaintiff leave to amend the complaint to add an additional cause of action. The Appellate court held that plaintiff (agent) had "raise[d] a question whether Ataka [parent] so controlled the actions of America [subsidiary] that unitary liability to the plaintiff arising from the actions of the defendants could be imposed on both corporations." Therefore, "If a breach of contract is proven, there is a triable issue as to the liability of Ataka as well as America." Id. p 422. The court said, regarding issues of fact: "The function of summary judgment is issue finding, not issue resolution." Id. P 423. Therefore summary judgment should not have issued that the parent had no liability. The New York court clarified that the primary issue was not the relation between parent and subsidiary, but was the breach of contract, which if proven would trigger review of the relation between parent and subsidiary. The court said: "Special Term accordingly improperly granted summary judgment holding in effect that there was no issue of fact as to whether there was a breach of contract or damages. A triable issue is plainly presented whether defendants' withdrawal from the export business constituted a breach of contract entitling plaintiff to damages." Id. p 423. Thus, in New York, the rule is that if an allegation is made that the parent is a unit with the subsidiary, then that is a triable issue of fact, and the case cannot be dismissed on a motion for summary judgment, but the case must be first tried to establish if it is a fact that there was a breach of contract as alleged. Under this rule, Judge Hellerstein erred in dismissing petitioners' action. This case is most relevant, as it sets forth New York law on central issues of this case.

In her affidavit presented to Judge Hellerstein, Appendix D-10-1, ICA's attorney, Ms. Jin Fang Pun, formerly general counsel at the Ministry of Economic Affairs, Taiwan, stated that the applicable law of Taiwan, entitled *Republic of China Company Law*, provides in Article 27 that such a company as Ford is defined as a "shareholder", and as such may appoint proxies [to run a subsidiary], and provides in Article 23 that if the proxies while conducting the business of the subsidiary [Lio Ho] act contrary to law [do "wrongful acts"] and cause damage, then both Ford and Lio Ho are jointly liable.

Wrongful acts as defined in article 184 of the *Civil Code*, she stated, means intentional or negligent acts which injure another, or immoral acts intentionally done. She states that if ICA can prove in court that Lio Ho wrongfully refused to pay ICA, then Ford is jointly and severally liable with Lio Ho for damages. Provisions of the statutes she cites are provided in Appendix D-10-2.

This Taiwanese law certainly provides for piercing the corporate veil, by way of a standard of strict liability, and places on ICA the primary burden to prove in court the wrongful act, damages for which--if the wrongful act is proven--will be paid by Ford and Lio Ho. Judge Hellerstein discarded Ms. Pun's affidavit without analysis or reason.

The Supreme Court, likewise, has held that disputed questions of fact must be resolved by a jury, not by a court granting a motion for dismissal. *General Electric Co. et al. v. Joiner*, 522 U.S. 136 (1997). The Court stated: "On a motion for summary judgment disputed issues of fact ( emphasis supplied) are resolved against the moving party [in this case that would be Ford]. . . . If the evidence raised a genuine issue of fact . . . then this basis for the ruling (on admissibility) was erroneous. . . ." The district court in this *ICA* case made two decisions not in accord with *GE*. First, the court ruled it could disregard ICA's attorney's affidavit, presumably because its facts disputed Ford's attorney's facts. In its second error under *GE*, the Court made findings of fact regarding the corporate structure of Ford and Lio Ho, their relationship, and the degree of independence of Ford managers working for Lio Ho. These findings were irrelevant to the purpose of the hearing, which was to determine whether Taiwanese law permitted a cause of action against Ford based on a theory of alter ego or piercing the veil. If such law existed in Taiwan then Ford was within the jurisdiction of the court in New York, where the factual issues of the relationship would be determined by a jury. Since ICA had never agreed to a trial by magistrate, but always requested a trial by jury, at that point the court should have marked the case against Ford for trial. The district court erred under *GE*. The appellate court erred in approving the decision of the district court, being in direct conflict thereby with the position taken by the Supreme Court.

Further, in making itself the trier of the facts, the court thereby deprived peititioners of their right to cross examine witnesses, and thus deprived petitioners of their right to due process guaranteed under the Fifth Amendment to the Constitution. Also, the judge thereby deprived petitioners of the right to present their own case to a jury to hear the facts and reach its decision, and thus deprived petitioners of their right to a jury trial guaranteed under the Seventh Amendment to the Constitution. Petitioners pray this Court to order that petitioners have personal jurisdiction over Ford in New York, and that the case should proceed to trial.

### *A corporation is liable for the acts of a subsidiary it controls for the purpose of wrongdoing*

The Supreme Court has clearly stated, in *United States v. Bestfoods et al.*, 524 U.S. 51 (1998), that the corporate veil may be pierced to undo wrongdoing. The Supreme Court suggested that it was mandatory for a court not to permit a corporation to hide behind the corporate veil, if by being indifferent the court permitted the misuse of the corporate form to conceal and promote a fraud. The Supreme Court spoke as follows:

> "But there is an equally fundamental principle of corporate law, applicable to the parent-subsidiary

> relationship as well as generally, that the corporate veil may be pierced and the shareholder held liable for the corporation's conduct, when, *inter alia*, the corporate form would otherwise (emphasis supplied) be misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder's behalf.

Based on the evidence brought to light at the very end of discovery, Ford had a wrongful purpose in dealing with ICA, and worked a fraudulent action on ICA, to save itself from paying ICA the fees due to ICA, all for the benefit of the shareholders of Ford. The district court refused to acknowledge the existence of the evidence showing the fraud, which was laid before it by plaintiff's counsel in writing and orally, and dismissed the case. The appellate court did not see error in this action. The courts below are deviant with respect to a fundamental principle of law which has been strongly espoused by the Supreme Court in *Bestfoods*, namely that the corporate veil should be pierced by the court when wrongdoing is perceived. The courts below failed in this duty.

*On the facts shown, petitioners were entitled to receive leave to amend the complaint to include a cause of action in fraud.*

Petitioners alleged that Ford, acting through Lio Ho, was the party that decided to breach the contract it had with ICA. The breach of the contract was a grievous injury, sufficient to support an action against Ford on the theory of alter ego, or piercing the corporate veil. The breach bankrupted ICA, that had invested its own funds to pay its operating costs and out of pocket expenses for 2-½ years while it worked to advance Ford's interests. Indeed, applicable Taiwanese law clearly aimed to sanction abusive corporate conduct on the part of a parent corporation that acted through the agency of its subsidiary but used the existence of the corporate veil to shield itself from prosecution for the wrongs it committed. Not only did Ford not want to pay ICA its fee for its success in helping Ford avoid a 10% increase in duty costs, Ford also did not want to pay ICA its fee for its success in persuading the Taiwanese government to agree to let Ford reduce the actual amount of duty it was then paying. In pursuit of its scheme to defraud ICA of the fees due to it, Ford not only fired ICA, but Ford lied to ICA and to the court that it had never benefitted from ICA's efforts to reduce the duty. Judge Koeltl noted the existence of Ford's argument in a footnote (Transcript page 91, note 11), where he said: "The defendants have argued that ICA never succeeded in obtaining a reduction in duties below the Base Amounts contained in the agreement." This is a total misstatement by Ford of the facts. The reduction of duty was achieved, using ICA's work, but the duty savings were concealed from ICA and from the court, and only discovered in 1998. Ford's main defense with which it defends itself from retribution for its misdeeds, is that it had not itself actually signed the contract with ICA and therefore is not subject to the rectifying power of the court. The courts below accepted this defense as valid. An act, such as delegating the authority to sign a contract to a subsidiary may not in itself be illegal, but it can be considered wrongful if it is part of a scheme to defraud a third party. *Continental Ore Co. v. Union Carbide Corp.*, 370 U.S. 690, 707 (1962). The Court spoke as follows:

> "Respondents are afforded no defense from the fact that Electro Met of Canada, in carrying out the bare act of purchasing vanadium from respondents rather than Continental, was acting in a manner permitted by Canadian law. There is nothing to indicate that such law in any way compelled discriminatory purchasing, and it is well settled that acts which are in themselves

legal lose that character when they become constituent elements of an unlawful scheme." (Citations omitted)

Plaintiff's lawyer, in papers filed with the court stated the existence of the fraud and submitted documentary proof thereof. The district court ignored this information. It erred in not permitting plaintiff to amend its complaint to include a cause of action in fraud. This error was approved by the appellate court. In not granting jurisdiction to ICA over Ford, the courts below acted contrary to the rule of law enunciated by the Supreme Court in *Bestfoods* and *Continental Ore.*

*The rules of the court provide that leave to amend pleadings should be freely given to do justice*

Fed. R. Civ. P. 15(a) provides that a party may amend the party's pleading by leave of the court, and leave shall be freely given when justice so requires, and Fed. R. Civ. P. 15(b) provides that amendment of the pleadings as may be necessary to cause them to conform to the evidence may be made upon motion of any party at any time. (Emphasis supplied) The circumstances of this case are that just before an oral hearing on the issue of jurisdiction with respect to Ford, petitioners received from respondent, pursuant to discovery that respondent had long delayed, a box of papers in which petitioners found evidence that respondent had secretly benefitted from the work of petitioners and falsely stated to the petitioners and to the court that it had not benefitted from their work. This caused petitioners to believe that they had been the victim of a fraud, and that the fraud had been planned from the beginning of its relationship with Ford, when Ford refused to sign the agreement they had reached verbally, but insisted that its subsidiary sign in its stead. In several ways the judge at the hearing refused to hear petitioners' new complaint. Petitioners believe that, due to the gravity of the charge, and the great difference that charge would make in the likelihood that the corporate veil would be pierced and petitioners would be accorded jurisdiction over Ford, the judge should have taken the position that even at an oral hearing on a motion to dismiss, it was never too late to hear the evidence to support a claim of fraud. Be the consummation of the orderly business of the court never so pressing, still there should be time to do justice. That is the message of the rules of the court. That lesson cannot be reinforced too often. Petitioners here request permission from this Court to amend the pleadings to conform with the evidence.

## SUMMARY

1. Petitioners pray this Court to order that petitioners have personal jurisdiction over respondent Lio Ho and that the case should proceed to trial.

2. Petitioners pray this Court to order that petitioners have personal jurisdiction over respondent Ford and that the case should proceed to trial.

3. Petitioners here request permission from this Court to amend the pleadings to conform with the evidence, and here move the Court that the pleadings be and hereby are amended to complain of fraud and deceit by Ford and Lio Ho.

## CONCLUSION

FOR THE REASONS SET FORTH ABOVE, THE WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: May 18, 2000
Roslyn, New York

Respectfully Submitted,

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# APPENDIX

## APPENDIX A

## INTERNATIONAL CUSTOMS ASSOCIATES, INC. and LESLIE L. BOROS, Plaintiffs, against FORD MOTOR COMPANY and FORD LIO HO MOTOR COMPANY, LIMITED (TAIWAN), Defendants.

94 Civ. 7173 (JGK)
United States District Court For The Southern District Of New York
893 F. Supp. 1251, 1995 U.S. Dist. Decision
August 1, 1995, Decided

Attorney for the plaintiffs: Lawrence R. Gelber, Esq., Beigel Schy Lasky Rifkind Goldberg Fertik & Gelber, New York, NY. Attorneys for the defendants: Steven Wolowitz, Esq., James J. McGuire, Esq., Nicholas W. Lobenthal, Esq., Mayer Brown & Platt, New York, NY.

John G. Koeltl, United States District Judge

[F. Supp. 1254] OPINION AND ORDER

JOHN G. KOELTL, District Judge:

The plaintiffs, International Customs Associates ("ICA") and Leslie Boros ("Boros") have sued the defendants, Ford Motor Company ("Ford") and Ford Lio Ho Motor Co., Limited (Taiwan) ("Lio Ho") for breach of contract and quantum meruit, alleging that the defendants failed to pay for services successfully rendered on their behalf by the plaintiffs and that the defendants refused to permit the plaintiffs to perform fully services pursuant to the written contract between the parties. Jurisdiction is based on diversity of citizenship.

The defendants have moved to dismiss the complaint with respect to Ford on one of two alternative grounds: (1) pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief can be granted; or (2) under the doctrine of forum non conveniens. The defendants have moved to dismiss the complaint with respect to Lio Ho on one of three alternative grounds: (1) pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief can be granted; (2) pursuant to Federal Rule of Civil Procedure 12(b)(2), for lack of personal jurisdiction; or, (3) under the doctrine of forum non conveniens.

## I.

Plaintiff ICA, which has been dissolved by the State of New York for non-payment of taxes, was a New York corporation at all times relevant to this action. (Compl. ¶ 4.) ICA was in the business of offering expertise in assisting multinational corporations to reduce import costs and customs duties. (Id.) Plaintiff Boros was the sole shareholder, officer, director and employee of ICA. (Compl. ¶ 5.) Defendant Ford, which is engaged in the manufacturing, selling and exporting of automobiles and automotive parts, is a Delaware corporation with a principal place of business in Dearborn, Michigan. (Compl. ¶ 6.) Defendant Lio Ho is a Taiwanese corporation headquartered in Taiwan. (Compl. ¶ 7.) Lio Ho is a subsidiary of Ford and is in the business of importing automobiles and other automotive products into Taiwan, manufacturing automobiles in Taiwan and selling automotive products in

Asia; Ford owns approximately seventy percent of Lio Ho. (Compl. ¶¶ 6, 7.)

ICA and Lio Ho entered into a written agreement on February 27, 1988 pursuant to which Lio Ho would pay ICA a monthly fee for up to twenty-four consecutive months contingent upon ICA's obtaining certain import duty and tax savings for Lio Ho.[1] The agreement provided that if ICA directly obtained "import duty and tax savings as measured against the Base Amounts" specified in the contract, and if ICA were the "sole cause" of the reductions in such duties or taxes, Lio Ho would pay ICA a contingent fee. (Exh. A to Compl. at ¶ 4(b).) Paragraph 4(b) of the contract provides that ICA's fee would be equal to:

> 25% of the after-tax import duty and tax savings [Lio Ho] actually realized for all such importations into the [Republic of China] within the first twelve months following the month in which each such duty/tax savings becomes effective, and 20% of each such after-tax duty/tax savings within the second twelve months therefrom.

[F. Supp. 1255] (Id.) The contract states that it became effective as of January 27, 1988. The "Base Amounts" against which any duty and tax savings were to be measured were the amounts that Lio Ho paid in duties and taxes at the time the parties executed the contract. (Exh. A to Compl. at ¶ 4(a).)

The parties do not dispute that ICA dissuaded Taiwan from implementing a ten percent duty increase on Lio Ho imports; they refer to this increase as the "upward valuation." However, while the plaintiffs contend that this entitled them to a fee under the agreement, the defendants claim that it did not.

It is the defendants' refusal to pay the plaintiffs a contingency fee for avoiding the upward valuation that the plaintiffs claim constitutes a breach of the contract.

The plaintiffs allege a second breach of contract by the defendants. The plaintiffs claim that because the defendants directed them not to enlist the assistance of the United States government in securing a decrease in customs duties beyond the rates in effect in September, 1988, the defendants prevented them from earning additional fees under the contract. The plaintiffs claim that the parties to the contract understood that in performing its obligations under the contract, ICA could enlist the assistance of the United States government in securing decreased duties for Lio Ho.

Arising out of these same events, the plaintiffs also allege that the defendants are liable under a theory of quantum meruit.

## II.

The defendants argue that the complaint should be dismissed with respect to Ford pursuant to Federal Rule of Civil Procedure 12(b)(6). "The court's function on a Rule 12(b)(6) motion is not to weigh the evidence that might be presented at a trial but merely to determine whether the complaint itself is legally sufficient." Festa v. Local 3 Int'l Bhd. of Elec. Workers, 905 F.2d 35, 37 (2d Cir. 1990); see also Kopec v. Coughlin, 922 F.2d 152, 155 (2d Cir. 1991). Therefore, a motion to dismiss must be denied unless "it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim which would entitle [them] to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957); accord Staron v. McDonald's Corp., 51 F.3d 353, 355 (2d Cir. 1995).[2] Under this standard, the complaint must be dismissed with respect to Ford for failure to state a claim upon which relief can be granted.

First, with respect to the contract claim, a contract cannot bind a non-party. See, e.g., Abraham Zion Corp. v. Lebow, 761 F.2d 93, 103 (2d Cir. 1985) (a non-signatory to a contract was not bound by a contract where the party who signed the contract was not the non-signatory's agent); see also Crabtree v. Tristar Automotive Group, Inc., 776 F. Supp. 155, 166 (S.D.N.Y. 1991) (Goettel, J.) ("It is hornbook law that a non-signatory to a contract cannot be named as a defendant in a breach of contract action unless it has thereafter assumed or been assigned the contract."); Beacon Syracuse Assocs. v. City of Syracuse, 560 F. Supp. 188, 201 (N.D.N.Y. 1983) ("Only those who are parties to a contract may be held liable for a breach of that [F. Supp. 1256] contract.") (citation omitted); Dember Constr. Corp. v. Staten Island Mall, 56 A.D.2d 768, 769, 392 N.Y.S.2d 299, 300 (1st Dep't 1977) ("Since [the defendant] was not a party to the contract, the complaint against it must be dismissed."). And, Ford clearly is not a signatory to the contract; rather, the contract was entered into by ICA and Lio Ho and signed by both entities' respective presidents. There is no ambiguity in the contract to support any argument to the contrary. The contract explicitly provides that Lio Ho is to pay the contingency fee to ICA. It is indisputable that this is an obligation only of Lio Ho under the contract, and that any failure to make payments under the contract, if payments were owed, was solely a failure of Lio Ho.

Acknowledging that Ford is not a signatory to the contract, the plaintiffs claim that Ford is a proper defendant on their breach of contract claim because the contract gave Ford express rights under the contract and imposed corresponding obligations, making Ford liable for any breach of the contract.[3] Paragraph 5(b) of the contract, on which the plaintiffs rely for this theory of liability, provides:

> [Lio Ho] and its parent or affiliated companies may adopt the recommendations of [ICA] in any country or countries other than the [Republic of China] without the prior written consent of [ICA] and shall have no obligation to pay any fees to [ICA] in connection therewith unless the company adopting the recommendation utilizes in presentations to government authorities confidential documentation prepared by [ICA] for [Lio Ho] hereunder, in which case the Company concerned and [ICA] will negotiate a reasonable fee for the use thereof taking into account the relative efforts of [ICA] as compared to its efforts under this agreement.

(Exh. A to Compl. at ¶ 5(b).) This provision of the contract notwithstanding, Ford is not a proper defendant for the plaintiffs' breach of contract claim because the complaint does not contain any allegation that Ford used confidential documentation prepared by ICA in any presentations to government authorities. Indeed, there has been no allegation by the plaintiffs, and the complaint does not state any claim, that Ford or Lio Ho breached this provision of the contract.

The plaintiffs also argue that Lio Ho signed the contract as an agent for Ford. While the plaintiffs point to negotiations among Ford, Lio Ho and ICA, to documents and a provision in the contract indicating that Lio Ho was subject to Ford corporate policy and to the facts that Lio Ho is a subsidiary of Ford (and is listed on Ford's balance sheet) and that the contract between ICA and Lio Ho had to be approved by Ford, the complaint nowhere alleges facts that support the plaintiffs' argument that Lio Ho signed the agreement on behalf of Ford as an agent of Ford. See Kashfi v. Phibro-Salomon, Inc., 628 F. Supp. 727, 735 (S.D.N.Y. 1986) ("The test for determining whether a corporation is acting as an agent for a related corporation is the same as the test imposed under the doctrine of piercing the corporate veil."). Rather, the contract does not indicate, in any way, that Lio Ho entered into the agreement on behalf of Ford as opposed to on its own behalf. Indeed, the complaint alleges that the agreement "obligated Ford Lio Ho to pay plaintiffs a monthly fee for up to twenty-four consecutive months, contingent upon plaintiffs obtaining certain import duty and tax savings on behalf of Ford Lio Ho." (Compl. ¶ 30.) And again: "ICA would earn its contingency fee under the Agreement if it effectuated tax savings on behalf of Ford Lio Ho through its own efforts." (Compl. ¶ 32.) Parol evidence could not be introduced to contradict an essential term of the contract. Here, the identity of the contracting party who had the payment obligation is an essential term of the contract; therefore, the plaintiffs could not introduce parol evidence to prove that Ford is a party to the contract. See Kashfi, 628 F. Supp. at 732; see also [F. Supp. 1257] Frishberg v. Esprit de Corp., Inc., 778 F. Supp. 793, 802 (S.D.N.Y. 1991) (Carter, J.) ("Under [the parol evidence] rule the clear and unambiguous terms of a valid, integrated written instrument cannot be contradicted or varied by prior or contemporaneous extrinsic oral or written evidence.") (citation omitted), aff'd, 969 F.2d 1042 (2d Cir. 1992).

Moreover, the complaint does not allege that Ford is the "alter ego" of Lio Ho and that the corporate veil should be pierced to reach Ford. See, e.g., Campo v. 1st Nationwide Bank, 857 F. Supp. 264, 271-72 (E.D.N.Y. 1994) (proposed amended complaint stated a cause of action for breach of contract against a non-signatory under an alter ego veil-piercing theory); Carrier Communications Corp. v. Cellular Tel. Enters., 189 A.D.2d 848, 848, 592 N.Y.S.2d 971, 971 (2d Dep't) ("The appellant failed to establish that [the respondent] was the alter ego of its parent. . . which would have allowed the court to pierce the corporate veil and hold a nonsignatory liable on the contracts in question. . . ."), leave to appeal denied, 82 N.Y.2d 656, 624 N.E.2d 177, 604 N.Y.S.2d 47, leave to appeal denied, 82 N.Y.2d 657, 624 N.E.2d 177, 604 N.Y.S.2d 47 (1993). Moreover, the complaint does not provide any other basis for holding Ford liable for an alleged breach of a contract to which it is not a signatory.

With respect to the plaintiffs' quantum meruit claim, the defendants are correct that where there is a valid and enforceable contract, a plaintiff cannot recover on a theory of quantum meruit. See, e.g. Stissi v. Interstate & Ocean Transp. Co. of Philadelphia, 814 F.2d 848, 851 (2d Cir. 1987) ("It is an elementary principle of contract law that, where there exists an express contract for compensation, an action outside that contract will not lie."); Weinreich v. Sandhaus, 850 F. Supp. 1169, 1182 (S.D.N.Y.) (Sweet, J.) ("It is well settled that recovery in quantum meruit is unavailable where an express contract covers the subject matter.) (citing Yonkers v. Otis Elevator Co., 844 F.2d 42, 48 (2d Cir. 1988)), amended in part on other grounds, 156 F.R.D. 60 (S.D.N.Y. 1994); Clark-Fitzpatrick, Inc. v. Long Island R.R., 70 N.Y.2d 382, 388, 516

N.E.2d 190, 193, 521 N.Y.S.2d 653, 656 (1987) (no action in quasi-contract ordinarily lies where there is a valid and enforceable contract governing the subject matter); Foss v. American Tel. & Tel. Co., 199 A.D.2d 668, 669, 605 N.Y.S.2d 143, 144 (3d Dep't 1993) (no cause of action for quasi-contract or quantum meruit where there was an express contract). However, alternative pleading is permitted. See, e.g., John J. Kirlin, Inc. v. Conopco, Inc., 1995 U.S. Dist. Decision, No. 94 Civ. 2675, 1995 WL 15468(S.D.N.Y. Jan. 17, 1995) (Schwartz, J.) ("While a party may not recover in quantum meruit and for breach of contract for events arising out of the same subject matter, 'consistency in pleading is not required by the federal rules, [and] a party may claim alternatively on an express contract and on an implied contract.'") (quoting 5 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure: Civil 2d, § 1235 at 274 (1990 & Supp. 1994)).

Nevertheless, the complaint in this case fails to state a claim against Ford in quantum meruit because it does not contain any allegations against Ford that would support a theory of quantum meruit, even viewing all of the allegations in the light most favorable to the plaintiffs. To prevail on a claim of quantum meruit, a plaintiff must prove: (1) that the plaintiff rendered services to the defendant; (2) that the defendant accepted such services; (3) that the plaintiff expected reasonable compensation; and (4) the reasonable value of the services. GSGSB, Inc. v. New York Yankees, 862 F. Supp. 1160, 1170 (S.D.N.Y. 1994); see also Benevento v. RJR Nabisco, Inc., 1993 U.S. Dist. Decision, No. 89 Civ. 6266, 1993 WL 126424(S.D.N.Y. April 1, 1993) (Leisure, J.) ("In order to prevail on claims of unjust enrichment and quantum meruit, 'a plaintiff must prove that the defendant was enriched, and that such enrichment was at plaintiff's expense, and that the circumstances were such that in equity and good conscience the defendant should return the money or property to the plaintiff.'") (quoting Dolmetta v. Uintah Nat'l Corp., 712 F.2d 15, 20 (2d Cir. 1983)).[4]

[F. Supp. 1258] Here, the complaint does not allege that ICA ever performed any services for Ford; rather, it claims that it performed services for Lio Ho. For example, the complaint alleges:

> The Agreement obligated Ford Lio Ho to pay plaintiffs a monthly fee for up to twenty-four consecutive months, contingent upon plaintiffs obtaining certain import duty and tax savings on behalf of Ford Lio Ho. . . . ICA would earn its contingency fee under the Agreement if it effectuated tax savings on behalf of Ford Lio Ho through its own efforts.

(Compl. ¶¶ 30, 32 (emphasis added).) The complaint proceeds to allege:

> Taiwan Customs, in reliance on the presentations of Boros and ICA, rendered its Duty Memo in December, 1988, which eliminated the 10% revaluation, thereby saving Ford Lio Ho tens of millions of American dollars in retroactive and prospective taxes and obligating Ford Lio Ho to pay ICA and Boros a contingency fee under the Agreement.

(Compl. ¶ 58 (emphasis added).) And, it alleges:

> As detailed above, ICA and Boros performed their part of the Agreement by (i) achieving substantial reductions with respect to the 10% revaluation and (ii) by proceeding to avail themselves of all lawful means to obtain favorable valuations for Ford Lio Ho.

(Compl. ¶ 72 (emphasis added).)

The plaintiffs' argument is that Ford is benefitted because a subsidiary saves money. But, under New York law, such an allegation does not state a claim for quantum meruit. The fact that a party benefits from performance does not, alone, make that party liable in quantum meruit. See, e.g., Metropolitan Elec. Mfg. Co. v. Herbert Constr. Co., 183 A.D.2d 758, 759, 583 N.Y.S.2d 497, 498 (2d Dep't 1992) ("It is well settled that in order to recover under a theory of quasi contract, a plaintiff must be able to prove that performance was rendered for the defendant, resulting in its unjust enrichment. That [the defendants] consented to the improvements provided by the plaintiff and accepted the benefits does not render them liable to the plaintiff [absent evidence that the defendants were in privity with the other party to the agreement or that they assumed an obligation to pay].") (citations omitted); Kagan v. K-Tel Entertainment, Inc., 172 A.D.2d 375, 376, 568 N.Y.S.2d 756, 757 (1st Dep't 1991) ("To recover under a theory of quasi contract, a plaintiff must demonstrate that services were performed for the defendant resulting in its unjust enrichment. It is not enough that the defendant received a benefit from the activities of the plaintiff; if services were performed at the behest of someone other than the defendant, the plaintiff must look to that person for recovery.") (citations omitted). While the plaintiffs point to the relationship between Ford and Lio Ho and the negotiations in which Ford participated prior to the execution of the contract, the agreement between the parties makes clear that ICA was to be paid by Lio Ho for services it performed for Lio Ho. Under these circumstances, Ford cannot be liable to the plaintiffs on a theory of quantum meruit.

Therefore, the complaint is dismissed under Federal Rule of Civil Procedure 12(b)(6) with respect to Ford for failure to state a claim upon which relief can be granted.[5]

III.

The defendants have moved to dismiss the complaint with respect to Lio Ho under Federal Rule of Civil Procedure 12(b)(2) on the basis that this Court does not have personal jurisdiction over Lio Ho. The Court has "broad discretion" in deciding how to proceed with a motion to dismiss for lack [F. Supp. 1259] of personal jurisdiction, including conducting an evidentiary hearing. Cutco Indus. v. Naughton, 806 F.2d 361, 364 (2d Cir. 1986). Because there has not been an evidentiary hearing in this case, the plaintiffs need only make a prima facie showing of personal jurisdiction over Lio Ho.[6] And, the pleadings and affidavits are to be interpreted in the light most favorable to the plaintiffs. CT Chem. Inc. v. Horizons Int'l, Inc., 106 F.R.D. 518, 519 (S.D.N.Y. 1985) (Sweet, J.); see also Hoffritz for Cutlery, Inc. v. Amajac, Ltd., 763 F.2d 55, 57 (2d Cir. 1985). Accordingly, along with the complaint and the contract, the Court has considered the affidavit of Boros submitted by the plaintiffs in opposition to the defendants' motion and has construed it in the light most favorable to the plaintiffs. Under this standard, the complaint must be dismissed with respect to Lio Ho.

A court sitting in diversity applies the law of the forum state in determining whether it has personal jurisdiction over a defendant. Cutco, 806 F.2d at 365; see also Hoffritz, 763 F.2d at 57. The New York long-arm statute, which provides for jurisdiction over non-domiciliary defendants in certain circumstances, provides in relevant part:

> As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent . . . transacts any business within the state . . . .

NY CPLR § 302(a)(1).[7] Under this provision, two conditions must be met for a court to have personal jurisdiction over a non-domiciliary defendant: first, the defendant must "transact business" in New York; and second, the claim against the defendant must arise out of that business activity. Cutco, 806 F.2d at 365. Here, there is no issue that the claim against Lio Ho arises out of the contract entered into between the parties; rather, the issue is whether Lio Ho has transacted business in New York.

Transacting business, under CPLR § 302(a)(1), "has been interpreted to require a certain quality, rather than a specific quantity, of contacts with New York." Broad Horizons, Inc. v. Central Crude Ltd., 1994 U.S. Dist. Decision, No. 94 Civ. 1593, 1994 WL 623075(S.D.N.Y. Nov. 9, 1994) (Leisure, J.) (citation omitted). "A nondomiciliary transacts business under CPLR § 302(a)(1) when he purposefully avails himself of the privilege of conducting activities within New York, thus invoking the benefits and protections of its laws." Cutco, 806

F.2d at 365 (internal quotations and citations omitted). "Whether or not the contacts are of the appropriate nature must be determined by an analysis of the totality of the circumstances." United States Theatre Corp. v. Gunwyn/Lansburgh Ltd. Partnership, 825 F. Supp. 594, 596 (S.D.N.Y. 1993) (Conboy, J.) (citations omitted).

In arguing that this Court does not have personal jurisdiction over Lio Ho, the defendants rely extensively on Broad Horizons. In Broad Horizons, a New York plaintiff had entered into a contract with a Canadian defendant pertaining to mining claims of Canadian land. Alleging breach of contract, the plaintiff sued the defendant in New York.

In concluding that the court lacked jurisdiction over the defendant, the court in Broad Horizons explained:

> The Contract deals with Canadian real estate. The Contract negotiations occurred via telephone and mail with [the defendant] in Canada and [the plaintiff] in New York, and the contract was executed by the parties in those respective locations. Defendant was never present in New York in connection with the Contract, nor were defendant's contacts with New York designed to permit it to conduct activities within New York. The bulk of the contractual performance by both parties focused on the development, condition, and [F. Supp. 1260] legal status of the mining claims, located in Canada. In sum, [the defendant] did not purposefully inject itself into New York, did not avail itself of the privilege of conducting activities in New York, and did not invoke the benefits and protection of New York

laws.

Broad Horizons, 1994 U.S. Dist. Decision, 1994 WL 623075 at *5; see also Wilhelmshaven Acquisition Corp. v. Asher, 810 F. Supp. 108, 113 (S.D.N.Y. 1993) (Cedarbaum, J.) (no personal jurisdiction under CPLR § 302(a)(1) where the contract negotiations took place simultaneously in New York and London and the center of gravity of the transaction was an oil refinery in Germany; "defendants' correspondence, telephone calls and telefax transmissions did not project them into events taking place in New York[]").

Based on all of the circumstances in Broad Horizons, Judge Leisure concluded that the defendant "did not intend to do business in New York[]" and that "the 'center of gravity' of the transaction [was] the development of land in Canada and not a business relationship formed with a New York company through phone and mail contact with Canada." Broad Horizons, 1994 U.S. Dist. Decision, 1994 WL 623075 at *3. The court found the defendant's communications from Canada with the plaintiff in New York to be "an insufficient basis" for the court to find that the defendant "projected itself into the New York forum." Id. at *4 (citing, inter alia, Beacon Enters., Inc. v. Menzies, 715 F.2d 757, 766 (2d Cir. 1983)). Because the communications between the parties were "merely a 'conduit to establish a contract[,]'" and not the transaction itself, the court found the communications insufficient to confer jurisdiction. Id. at *4 (citation omitted); cf. Parke-Bernet Galleries, Inc. v. Franklyn, 26 N.Y.2d 13, 256 N.E.2d 506, 308 N.Y.S.2d 337 (1970) (the interstate communication between the parties constituted the transaction at issue and provided a basis for jurisdiction over the nondomiciliary defendant).

In this case, an examination of all of the relevant factors indicates that Lio Ho did not conduct the kind of purposeful activity that is required to subject it to personal jurisdiction in New York. While it is relevant that the contract contained a choice of law clause indicating that New York law would apply, see Cutco Indus., Inc., 806 F.2d at 366-67 (it is appropriate to give "some weight" to a choice of law provision); Benjamin Sheridan Corp. v. Benjamin Air Rifle Co., 827 F. Supp. 171, 176 (W.D.N.Y. 1993) (choice of law clauses do not, alone, confer jurisdiction, but they are "relevant" in determining whether a defendant has transacted business for purposes of CPLR § 302(a)(1))[8], [F. Supp. 1261] almost every other aspect of the contract, and all of the circumstances surrounding the contract, demonstrate that there is no personal jurisdiction over Lio Ho.

First, the negotiations were not conducted in New York. Instead, they were conducted with ICA in New York and Lio Ho in Taiwan. All of the face-to-face negotiations between ICA and Lio Ho occurred in Taiwan and all other negotiations between Lio Ho and ICA were conducted by mail and by wire with ICA in New York and Lio Ho in Taiwan. Moreover, the contract was executed in Taiwan and, following the execution of the contract, all communication regarding the contract between ICA and Lio Ho was by mail or wire, again with ICA in New York and Lio Ho in Taiwan.

Telephone calls and correspondence sent into New York, by a non-domiciliary defendant who is outside New York, generally are insufficient to establish personal jurisdiction. See, e.g., PaineWebber Inc. v. WHV, Inc., 1995 U.S. Dist. Decision, No. 95 Civ. 0052, 1995 WL 296398, *3

(S.D.N.Y. May 16, 1995) (McKenna, J.) ("Telephone calls are insignificant for purposes of jurisdiction except when defendants use the telephone to actively participate in business transactions in New York.") (citations omitted); Standard Enters., Inc. v. Bag-It, Inc., 673 F. Supp. 1216, 1220 (S.D.N.Y. 1987) (Sweet, J.) ("Interstate telephone contacts do not generally have any great significance in § 302(a)(1) analyses."); Current Textiles Corp. v. Ava Indus., 624 F. Supp. 819, 821 (S.D.N.Y. 1985) (Sweet, J.) ("In general, telephone conversations between litigants inside and outside of the state about the contract at issue will not sustain personal jurisdiction under section 302(a)(1) absent additional evidence that the out of state litigant purposefully availed himself of the privilege of conducting activities in New York State.") (citation omitted); Xedit Corp. v. Harvel Indus. Corp. Fidelipac, 456 F. Supp. 725, 727 (S.D.N.Y. 1978) (Frankel, J.) ("Under New York law, interstate negotiations by telephone are not contacts that subject a defendant to jurisdiction at the instance of the New York party receiving the communication.") (citation omitted); L.F. Rothschild, Unterberg, Towbin v. McTamney, 89 A.D.2d 540, 452 N.Y.S.2d 630 (1st Dep't 1982) (telephone conversations resulting in the purchase of stock by the defendant in Pennsylvania to the plaintiff, a brokerage firm, were insufficient to confer personal jurisdiction), aff'd, 59 N.Y.2d 651, 449 N.E.2d 1275, 463 N.Y.S.2d 197 (1983); J.E.T. Advertising Assocs., Inc. v. Lawn King, Inc., 84 A.D.2d 744, 745, 443 N.Y.S.2d 745, 747 (2d Dep't 1981) (no jurisdiction under §§ 302(a)(1) where the contract was negotiated by phone or mail, no meetings were held in New York and all of the New York activities relating to the contract were performed by the plaintiff); cf. Parke-Bernet Galleries, Inc. v. Franklyn, 26 N.Y.2d 13, 17-18, 256 N.E.2d 506, 508-09, 308 N.Y.S.2d 337, 340-41 (1970) (the court had personal jurisdiction over the defendant where the defendant, who was outside New York, received and conveyed bids in a New York auction over an open phone line with an agent physically present at the auction; the phone participation was sufficient because, through the phone, the defendant "projected himself" into the auction room, purposefully availing himself of the privilege of conducting activities in New York); Rothschild v. Thompson, 78 A.D.2d 795, 795, 433 N.Y.S.2d 6, 7 (1st Dep't 1980) (telephone and mail contact was sufficient to confer personal jurisdiction where the defendant sent checks and securities, and an agreement, to the plaintiff in New York and New York law applied to the agreement). Under the cases, [F. Supp. 1262] there is no way to characterize the correspondence between ICA and Lio Ho as sufficiently purposeful activity by Lio Ho to subject it to personal jurisdiction in New York.

Second, while the parties disagree with respect to the amount of performance that was to occur in Taiwan, it is clear that a substantial part of the performance under the contract was to occur in Taiwan because ICA was to represent Lio Ho before Taiwanese customs authorities for the purpose of obtaining lower Taiwanese duty rate classifications and lower dutiable values on Lio Ho's products. The contract was centered around activities occurring in Taiwan—ICA was to be paid a contingent fee to be determined on the basis of reductions it obtained in the duty rates, dutiable value and import duty taxes of Taiwan. (Exh. A to Compl. at ¶ 4(a).)

Third, any fees that Lio Ho became obligated to pay ICA under the agreement were to be paid in Taiwanese currency to a Taiwanese bank account. (Exh. A. to Compl. at ¶ 4(a).) It was an alleged failure to make such a payment that the plaintiffs contend constitutes a breach of contract.

Moreover, the plaintiffs' allegation that Lio Ho was an agent of Ford is jurisdictionally irrelevant. Under CPLR § 302(a), the acts of an agent may subject a foreign principal to personal jurisdiction; however, that statutory provision does not provide for the "reverse." It does not permit the acts of a principal to be imputed to a foreign agent to confer jurisdiction over the agent. *See* CPLR § 302(a); see also Maresca v. Holiday Inns, Inc., 1993 U.S. Dist. Decision, No. 92 Civ. 4550, 1993 WL 8166 *4 (S.D.N.Y. Jan. 5, 1993) (Patterson, J.); Friedson v. Lesnick, 1992 U.S. Dist. Decision, No. 91 Civ. 2133, 1992 WL 51543 *3 (S.D.N.Y. March 9, 1992) (Martin, J.); Reingold v. Deloitte Haskins & Sells, 599 F. Supp. 1241, 1252 (S.D.N.Y. 1984) (Goettel, J.); Grove Valve & Regulator Co. v. Iranian Oil Servs., Ltd., 87 F.R.D. 93, 96 (S.D.N.Y. 1980) (Weinfeld, J.).[9]

And, the plaintiffs' arguments regarding the plaintiffs' own contacts with New York do not provide the Court with jurisdiction, including their contention that the majority of ICA's performance under the contract would occur in New York. The appropriate focus of an inquiry under CPLR § 302(a)(1) is on what the non-domiciliary defendant did in New York and not on what the plaintiffs did. Benjamin Sheridan Corp., 827 F. Supp. at 176; see also Marble Tile Imports v. Mihelich and Assocs., 1993 U.S. Dist. Decision, No. 92 Civ. 1934, 1993 WL 177805 *2 (S.D.N.Y. May 19, 1993) (Preska, J.) (the unilateral activity of the plaintiff does not support jurisdiction over a non-domiciliary defendant); Laufer v. Ostrow, 55 N.Y.2d 305, 312, 434 N.E.2d 692, 696, 449 N.Y.S.2d 456, 460 (1982) (a plaintiff may not rely solely on the plaintiff's own activity in New York for purposes of CPLR § 302).[10]

[F. Supp. 1263] In short, the totality of Lio Ho's activities are insufficient to provide personal jurisdiction in New York over Lio Ho. Even crediting all of the plaintiffs' allegations in the light most favorable to them, the plaintiffs have not made out a prima facie case that Lio Ho's activities rose to the level of purposeful activity needed to confer personal jurisdiction in New York under CPLR § 302(a)(1).[11]

## IV.

Therefore, the Court grants defendant Ford's motion to dismiss the complaint against it for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) without prejudice. The plaintiffs may serve and file an amended complaint within thirty (30) days of the entry of this Opinion and Order.[12] The Court also grants defendant Lio Ho's motion to dismiss for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2).

SO ORDERED.

John G. Koeltl
United States District Judge

Dated: New York, New York
August 1, 1995

[1] While the agreement clearly was between ICA and Lio Ho, the plaintiffs, throughout their papers, refer to "the plaintiffs" and "the defendants." As discussed below, this is a thinly veiled attempt to expand the parties to the contract. "Corporation" as used in the contract is a defined term which refers to Lio Ho. Moreover, Lio Ho and ICA are the only signatories to the contract.

[2] Although the plaintiffs have submitted documents outside the pleadings in opposition to the defendants' 12(b)(6) motion, the motion will not be treated as a motion for summary judgment because the parties were not given notice that the motion would be converted and, therefore, they were not given the opportunity to submit all materials pertinent to a summary judgment motion. See Fed. R. Civ. P. 12(b); see also Festa, 905 F.2d at 38 (notice of conversion from a 12(b)(6) motion to a summary judgment motion is mandatory). Accordingly, the Court has not considered the affidavits and other documents in deciding the defendants' motion under Federal Rule of Civil Procedure 12(b)(6). In any event, the defendants have not relied upon any materials outside the complaint and the contract attached to the complaint for their Rule 12(b)(6) motion. In deciding the motion, the Court has considered the complaint, as well as the written agreement, or contract, that underlies this action because it was appended to the complaint. See Cosmas v. Hassett, 886 F.2d 8, 13 (2d Cir. 1989) ("On a motion to dismiss, the district court must limit itself to a consideration of the facts alleged on the face of the complaint and to any documents attached as exhibits or incorporated by reference.") (citations omitted); see also Sazerac Co., Inc. v. Falk, 861 F. Supp. 253, 257 (S.D.N.Y. 1994) (Sweet, J.) (when a plaintiff bases a claim on a written instrument and the written instrument contradicts allegations in the complaint, the document controls).

[3] At oral argument, counsel for the plaintiffs explained that the plaintiffs do not contend that they can sue Ford because Ford is a third-party beneficiary to the contract. Indeed, such an argument would be unavailing. The status of an intended third-party beneficiary gives that person the right to sue; it does not give others the right to sue that person on the contract. See Abraham Zion Corp. v. Lebow, 761 F.2d 93, 103 (2d Cir. 1985).

[4] At oral argument, the plaintiffs argued that Ford benefits from the reduction of tariffs achieved for Lio Ho because Lio Ho is listed on Ford's consolidated balance sheet. However, this argument is really an argument that Ford is a third-party beneficiary to the contract, an argument that would not support the imposition of liability on Ford for breach of contract. See Abraham Zion Corp. v. Lebow, 761 F.2d 93, 103 (2d Cir. 1985).

[5] Because the plaintiffs' complaint has been dismissed with respect to Ford for failure to state a claim upon which relief can be granted, it is unnecessary to consider the defendants' motion to dismiss the complaint with respect to Ford on grounds of forum non conveniens.

[6] Notably, this is a case where the plaintiffs have access to the necessary materials to show personal jurisdiction—if such jurisdiction were to exist—because the basis of alleged jurisdiction is the contacts Lio Ho had with the plaintiffs in connection with the contract at issue in this case.

[7] At oral argument, counsel for the plaintiffs represented that the plaintiffs do not argue that the Court has "general jurisdiction" over Lio Ho under CPLR § 301.

[8] The defendants argue that the import of the choice of law clause is that New York conflicts rules apply, requiring the application of the "grouping of contacts test." See, e.g., Transport Properties, Inc. v. ABC Treadco, Inc., 589 F. Supp. 445, 447 (S.D.N.Y. 1984) (Weinfeld, J.) (the law of the jurisdiction that has the greatest concern with the specific issues raised in the litigation applies); Hormel Int'l Corp. v. Arthur Andersen & Co., 55 A.D.2d 905, 906, 390 N.Y.S.2d 457, 458 (2d Dep't 1977) ("With respect to both contracts and torts, the 'center of gravity', or 'grouping of contacts', theory now governs the choice of law. . .) (citation omitted). The defendants argue that, under such a test, Taiwanese law applies. However, there is substantial support for the proposition that the reference to New York law in the agreement means New York substantive law, and not New York conflicts laws, applies.

For example, in Woodling v. Garrett Corp., 813 F.2d 543 (2d Cir. 1987), the Court of Appeals interpreted a provision in a release that stated that "the validity, effect and enforceability, as well as the rights of the parties hereto regarding this Release shall be governed, construed and interpreted solely in accordance with the laws of the State of Connecticut." Id. at 551 (internal quotation omitted). The court, which was sitting in diversity, consulted New York choice of law rules to determine "whether and to what extent the parties' contractual choice should be honored." Id. The court explained:

> When such a provision exists and the jurisdiction chosen by the parties has a substantial relationship to the parties or their performance, New York law requires the court to honor the parties' choice insofar as matters of substance are concerned, so long as fundamental policies of New York law are not thereby violated.

Id.; see also Cargill, Inc. v. Charles Kowsky Resources, Inc., 949 F.2d 51, 55 (2d Cir. 1991) ("In the absence of a violation of a fundamental state policy, New York courts generally defer to the choice of law made by the parties to a contract. However, New York law allows a court to disregard the parties' choice when the 'most significant contacts' with the matter in dispute are in another state.") (citations omitted). And, in Economu v. Borg-Warner Corp., 652 F. Supp. 1242 (D. Conn.), aff'd, 829 F.2d 311 (2d Cir. 1987), the court explained that where a provision in an employment contract specified that New York law would govern any disputes arising out of the contract, that provision meant that New York substantive law, and not New York conflicts laws, applied. Id. at 1246; see also Keene Corp. v. Bogan, 1990 U.S. Dist. Decision, No. 88 Civ. 0217, 1990 WL 1864(S.D.N.Y. Jan. 11, 1990)(Mukasey, J.)(choice of law provision that stated that the contract should be governed and construed in accordance with the laws of New York, including those relating to conflicts law, was held to mean that New York substantive law would govern so long as New York had sufficient contacts with the transaction and there was neither fraud nor a violation of public policy).

It is unnecessary to decide whether the choice of law clause would make New York or Taiwanese law applicable to this action because, even assuming that it would make New York law applicable, that would not be sufficient to confer personal jurisdiction over Lio Ho.

[9] Similarly, while the plaintiffs contend that Lio Ho's affiliation with Ford subjects Lio Ho to personal jurisdiction, there is no support for such a jurisdictional premise. Under appropriate circumstances, when a foreign parent exercises such pervasive control over a subsidiary that the subsidiary is a "mere department" of the parent, courts will find that the activities of the subsidiary subject the foreign parent to personal jurisdiction. See Porter v. LSB Indus., Inc., 192 A.D.2d 205, 213, 600 N.Y.S.2d 867, 872-73 (4th Dep't 1993). That is based on the fact that CPLR § 302(a) subjects a non-domiciliary to jurisdiction based on the acts of its "agents" in New York. The existence of Lio Ho's parent in New York is not the existence of Lio Ho's agent in New York.

[10] Because Lio Ho's activities in New York do not constitute the transaction of business as defined by CPLR § 302(a)(1), there is no need to determine whether the assertion of jurisdiction would comport with due process. See Asahi Metal Indus. Co. v. Superior Court of California, 480 U.S. 102, 113, 94 L. Ed. 2d 92, 107 S. Ct. 1026 (1987) (the exercise of personal jurisdiction must comport with "'traditional notions of fair play and substantial justice.'") (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316, 90 L. Ed. 95, 66 S. Ct. 154 (1945)).

The plaintiffs have asked, if the Court finds that there is no jurisdiction over Lio Ho, for permission to take discovery from the defendants. While there are circumstances in which it is appropriate, in the Court's discretion, to permit a plaintiff to obtain discovery on the issue of personal jurisdiction over a defendant, see, e.g., Lehigh Valley Indus., Inc. v. Birenbaum, 527 F.2d 87, 93 (2d Cir. 1975) (noting the court's discretion to permit discovery on jurisdiction in the face of a motion to dismiss); Manhattan Life Ins. Co. v. A.J. Stratton Syndicate, 731 F. Supp. 587, 593 (S.D.N.Y. 1990) (Carter, J.) (same) (citing Grove Valve & Regulator Co., Inc. v. Iranian Oil Servs., 87 F.R.D. 93, 96 n.8 (S.D.N.Y. 1980) (Weinfeld, J.)), here, the plaintiffs have not made a sufficient showing to justify granting such a request. The plaintiffs have represented that they do not contend that Lio Ho is subject to "general" jurisdiction based on Lio Ho's "doing business" in New York. See NY CPLR § 301. Instead, they have argued that it is Lio Ho's transaction of business relating to the contract at issue that subjects Lio Ho to personal jurisdiction. Therefore, the necessary materials to resist the motion to dismiss for lack of personal jurisdiction are within the knowledge of the plaintiffs. And, the plaintiffs have conceded that no one from Lio Ho ever came to New York in relation to any aspect of the contract negotiations or performance. The plaintiffs have suggested no viable basis for a finding of personal jurisdiction. See, e.g., Findlay v. Duthuit, 86 A.D.2d 789, 790-91, 446 N.Y.S.2d 951, 953 (1st Dep't 1982) (denying discovery); see also Schumacher v. Sea Craft Indus., 101 A.D.2d 707, 707, 475 N.Y.S.2d 690, 691 (4th Dep't 1984) (no discovery permitted where the plaintiff set forth "no basis for the unsubstantiated statements on which he attempts to found long-arm jurisdiction").

[11] Because there is no personal jurisdiction over Lio Ho, it is unnecessary to address the Rule 12(b)(6) aspect of the defendants' motion that seeks dismissal of the complaint with respect to Lio Ho for failure to state a claim upon which relief can be granted. The defendants have argued that ICA was not entitled to payment under the contract because ICA never succeeded in obtaining a reduction in duties below the Base

Amounts contained in the agreement. It also is not necessary to address the defendants' motion to dismiss on grounds of forum non conveniens.

[12] See, e.g., Crabtree, 776 F. Supp. at 168 (granting the plaintiffs leave to replead a breach of contract claim against a non-signatory to the contract.)

## APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-----------------------------------------------x

INTERNATIONAL CUSTOMS
ASSOCIATES,
Plaintiff,

94 CV 7173 (AKH)

v.

FORD MOTOR COMPANY,
Defendant.
-----------------------------------------------x

April 23, 1999
10:00 a.m.

Before:

HON. ALVIN K. HELLERSTEIN,

District Judge

APPEARANCES

MUNZER & SAUNDERS, LLP
Attorneys for Plaintiff
BY: CRAIG SAUNDERS
-and-
LAWRENCE R. GELBER

MENAKER & HERRMANN, LLP
Attorneys for Defendant
BY: MICHAEL J. LEVIN

(Case called)

(In open court)

THE COURT: Good morning. Let me compliment you on your briefs. I found them clear and easy to read and I'm grateful for your help.

Let me ask you first, Mr. Levin—

MR. LEVIN: I'm Michael Levin, your Honor.

THE COURT: Yes. I'd like to understand the choice of law clause in the contract, why New York law or Taiwanese law should apply. I would understand that when parties sign a contract the law that governs deals with the disappointed expectations of the promisee. Here the promisee is ICA. Looking into this contract, shouldn't ICA expect that New York law would decide to what extent, if at all, there should be a piercing of the corporate veil?

MR. LEVIN: My reaction, your Honor, to your comment about New York law was first I thought you were talking about the substantive law applying to the four corners of the agreement.

THE COURT: We don't know what this clause means. It just said that New York law would apply.

MR. LEVIN: I understand, your Honor. Your Honor is asking a different question than the one I thought your Honor was first raising, which is, does somehow that choice of law clause govern the issue of piercing the corporate veil or vicarious liability of the parent for the acts of the subsidiary.

And I think the answer to that, your Honor, is the Second Circuit case, which is the Fletcher case, I believe, which we've cited. And I think that case, your Honor, establishes that the Court in this case, a diversity case, should look to the law of the state of incorporation, the forming of the corporation of the contracting party. Now, that is in this case, of course, a Taiwanese corporation.

THE COURT: Suppose you and I, Mr. Levin, made a contract in Belgium and we said we don't know anything about the law of Belgium, so that we want to have our substantive procedural and conflicts disputes governed by the law of New York. Wouldn't that contractual provision control?

MR. LEVIN: I don't think it would control as a procedure, your Honor. Depends where the lawsuit is brought and assuming that there are sufficient contacts with New York to have that choice of law clause operative. My point is somewhat different. There's no question that the choice of law, I think, is effective as to the rights of the parties to the contract. But that's not the issue that we're raising. We're saying that when you look to the rights or obligations of an entity, which is not a party to that agreement, Ford never agreed to that choice of law clause.

THE COURT: So you're saying that because Ford did not agree to the choice of law clause and because Ford established a subsidiary corporation on the shores of another sovereignty, the laws of that other sovereignty would govern to what extent, if at all, Ford should be liable for wrongs committed –

MR. LEVIN: My conclusion is not based on the fact that Ford is not a party to the contract. It's based on Second Circuit Law. The fact that Ford is not a party –

THE COURT: I'd like to try to understand the rationale and then we'll go into the law. But your point, if I could restate it again, is that, A, Ford Motor Company is not a party to the contract.

MR. LEVIN: That's correct.

THE COURT: B, therefore, the choice of law clause in the contract does not determine to what extent, if at all, Ford Motor Company is liable for wrongs committed by the subsidiary. C, since Ford established the subsidiary or purchased 70 percent of the stock of the subsidiary in connection with the laws governing that subsidiary where that subsidiary was incorporated, where it was situated, therefore, Ford Motor Company should be bound to the extent that the laws of the subsidiary's incorporation say it should be.

MR. LEVIN: That's correct.

THE COURT: Mr. Saunders, what do you think of that?

MR. SAUNDERS: Good morning, your Honor.

THE COURT: Good morning.

MR. SAUNDERS: With respect to this issue, your Honor, while Mr. Levin has stated that Ford is not a party to this contract, when in fact if you actually look at the facts and the testimony that's been adduced from this case, you will see that it is undisputed that Ford negotiated the agreement; the agreement had to go through Ford's general counsel; Ford commented on it; Ford had to approve the agreement.

THE COURT: Let me try to simplify and abstract the issue a bit. Let's suppose Ford did not become a party to this agreement. I'll let you argue your point. Let's assume Ford Motor Company did not become a party to this agreement. Do you agree or disagree that the choice of law clause in the agreement is irrelevant?

MR. SAUNDERS: I think it's relevant.

THE COURT: Why is it relevant?

MR. SAUNDERS: I think it's relevant because if you see the way the agreement is stated, the parties have agreed to a certain aspect. They agreed that it was going to be New York law.

THE COURT: Which parties, however? The subsidiary and your client agreed?

MR. SAUNDERS: If you're taking that scenario.

THE COURT: We are working under that hypothesis.

MR. SAUNDERS: Under that hypothesis, I would say then if these are what the parties agreed to, then it should be New York law.

THE COURT: As between the parties.

MR. SAUNDERS: As between the parties.

THE COURT: What about the parent corporation of one of the parties?

MR. SAUNDERS: I believe it should be that way as well because even if you look to the Taiwanese law and you want to cite – let's forgot about New York law. Let's say it's going to go to Taiwanese law. It says that a contract with foreign elements, the law of New York is going to apply there, where the foreign elements are. So Taiwan.

THE COURT: I'm asking you now not about the conflicts law of Taiwan. The first thing I've got to do is find out what law applies. Now, as the judge sitting in a diversity case, I'm bound to apply the New York conflicts of law rules. That's the first step. There is no questions about that. That's stuff I learned in law school.

The second step is to find out what a New York court, state court, would do where it sees a contract between a plaintiff and an entity which is a subsidiary of an American one, where the plaintiff and that foreign entity have formed a contract. The contract has a choice of law clause in it. But the party which has sought to be bound is not a party to that contract; it's only the parent of the party signing the contract. Does the New York court apply the choice of law provision in the contract between the subsidiary and the plaintiff? That's the question we will address right now, and the only question.

MR. SAUNDERS: I think it does because New York has a greater interest in determining this case than Taiwan does.

THE COURT: Why?

MR. SAUNDERS: Because what you have here is you have a New York corporation. You have the parties. The plaintiff is a New York entity. The agreement pretty much was negotiated through here, and I don't think Taiwan has a great interest in determining a case between ICA and between Ford Motor Company, two American companies.

THE COURT: Your point is that regardless of what's said in the contract, since the balance of interest heavily favors New York, in your view, New York law should apply?

MR. SAUNDERS: Yes.

THE COURT: You just told me then we find the choice of law clause in the contract irrelevant. Your analysis says we find New York law to be applicable regardless of what's said in the contract.

MR. SAUNDERS: Correct.

THE COURT: Okay. I think you both agree. I think you both agree in this situation that the law pertaining to the issue of whether the parent is liable for the wrongs committed by the subsidiary is a function of some analysis that is independent of what is stated in the contract between the subsidiary and the plaintiff.

The next argument, and I'll deal with Mr. Saunders now, Mr. Levin, is why the law should be something other than Taiwan. Your point is that New York was the place where the negotiations occurred with people living or coming into New York. Is that your point?

MR. SAUNDERS: Yes.

THE COURT: All right. So the people were negotiating in New York. Was the purpose of the contract to do anything with New York?

MR. SAUNDERS: The purpose of the contract was to employ a New York corporation to effect savings, customs savings.

THE COURT: Where?

MR. SAUNDERS: In Taiwan.

THE COURT: So the purpose and effect of the contract would operate in Taiwan, is that right?

MR. SAUNDERS: The actual, I guess it depends how you define purpose and effect.

THE COURT: The purpose and effect were to effect savings, economic savings, to either the Ford Motor Company in Dearborn, Michigan, or to the subsidiary in Taiwan. It had nothing to do with anything in New York.

MR. SAUNDERS: Only to the extent that you're having a New York corporation going into Taiwan to effect savings on a Michigan corporation that's going to affect their bottom line. It does not affect New York—if your question is were there certain acts relating to the contract that occurred in New York, the answer is going to be no.

THE COURT: And it didn't make a difference if it was a New York corporation or Delaware corporation or California corporation because the entire implementation of the contract would be in Taiwan.

MR. SAUNDERS: That's where the services were to be performed, yes.

THE COURT: Do you argue in favor of Michigan law?

MR. SAUNDERS: No, I do not.

THE COURT: And Mr. Levin does not.

MR. SAUNDERS: I don't believe he does.

THE COURT: I'm going to find now, so far, tentatively, that New York law is not the governing law, that I have nothing to do with New York law and my focus has to be elsewhere, and I think Judge Koeltl has held, and I agree with him that the governing law will be the law of Taiwan, in both cases persons competent in Taiwanese law, and I think both of you agree that the interpretation of law is a decision for the Court and not for the jury.

Am I correct, Mr. Saunders? Do you agree that it is I who has the responsibility to decide what's the governing law, whether Taiwanese or something else?

MR. SAUNDERS: Under the governing law, choice of law, yes, your Honor.

THE COURT: Mr. Levin, do you agree with that?

MR. LEVIN: I agree.

THE COURT: All right. The parties have offered affidavits of Taiwanese experts regarding the proper interpretation of Taiwanese law when one has a 70 percent shareholder which has done various kinds of things in Taiwan. You have not, Mr. Saunders, had an opportunity to respond to the reply affidavit and brief, so I'd like you to tell me now what factors you believe under Taiwanese law caused me to sustain your cause of action against the Ford Motor Company, not a party, for the moment anyhow, to the contract. The next question after this will be whether it is a party. But let's do this.

MR. SAUNDERS: Okay. One of the main problems, your Honor, that we have had throughout this case, and you'll see where I'm going with this in a second in answering your question, is having the production of documents from the Ford Motor Company.

THE COURT: Ford has said, and I think I know where you're going, that a particular document by which Ford Motor Company first entered Taiwan can't be found.

MR. SAUNDERS: Correct.

THE COURT: That wasn't to argue that we should interpret the document as if it were to have been found.

MR. SAUNDERS: Correct, your Honor.

THE COURT: Let's do that.

MR. SAUNDERS: If we work on that scenario, your Honor, and if we take the negative inference and we find that Ford was established as a recognized foreign company, then the affidavit of our expert, Jin Fang Pun, clearly states that under the scenario here, if there was a breach of contract which we have alleged, and we think that we have proven at this stage or there are enough facts, material facts in dispute so that a jury will have to determine whether or not there was a breach, Ford can be held liable.

The affidavit, the reply affidavit—

THE COURT: What is it about a recognized foreign company—I use that phrase as a term of art—that makes the foreign company liable every time its subsidiary breaches a contract?

MR. SAUNDERS: Once Ford became a registered foreign company—

THE COURT: Is it a registered foreign company or recognized foreign company?

MR. SAUNDERS: I believe it's registered.

THE COURT: Sorry.

MR. SAUNDERS: It became a juristic person which allowed it to contract and to do business in Taiwan as a recognized foreign company. Ford then had the right and full capacity to do business and engage in all necessary transactions in Taiwan.

THE COURT: Does that mean that it had that right to the exclusion of the subsidiary?

MR. SAUNDERS: I'm sorry?

THE COURT: Let's say that Ford establishing a subsidiary. It owns 70 percent of the stock of the subsidiary, and the subsidiary makes a contract. Does the fact that Ford Motor Company has itself the right to enter into the contracts bear on the question of whether it should be responsible for a solemn corporate contractual act performance by its subsidiary?

MR. SAUNDERS: Yes, it does. And that's what article 375 states.

THE COURT: Where do I find article 375?

MR. SAUNDERS: It's the Republic of China company law.

THE COURT: Where in the papers do I find it?

MR. SAUNDERS: Give me one second, your Honor.

THE COURT: Yes, of course.

MR. SAUNDERS: Looking through our papers, your Honor, I do not believe that—

THE COURT: It is not cited, is it? The section is not cited. Your expert relies on article 23.

MR. SAUNDERS: We have not attached it. We can attach it and provide it to the Court. I'm sorry, your Honor.

THE COURT: No. I'm going to take these papers as complete. It seems to me, Mr. Saunders, just listening to your argument and applying my understanding intuitively, and as educated by the papers here, including the papers submitted by Mr. Levin, that the fact that Ford Motor Company might have been a registered foreign company and entitled to perform juristic acts, does not negate the possibility that Ford Motor Company could establish a separate corporation on Taiwanese soil and does not create a necessary liability on the part of Ford Motor Company for every contractual act or possible breach performed by the subsidiary because the subsidiary itself is a juristic person.

MR. SAUNDERS: Article 375 though says that they are subject to the jurisdiction, they being Ford, of the Taiwanese Court.

THE COURT: They could be subject to jurisdiction. I don't deny that. Just as if something happens in New York. If XYZ Corporation, a Delaware corporation, came into New York and took out a certificate of doing business, it becomes a juristic person in New York subject to New York laws and capable of being sued in New York. But if it creates a subsidiary in New York and the subsidiary makes a contract in New York, that doesn't mean the juristic person who came into the jurisdiction is necessarily liable for acts committed by the subsidiary or contract created by the subsidiary.

MR. SAUNDERS: Correct, but I think what one has to look at in analyzing is what role did Ford play in this.

THE COURT: That's the next point.

MR. SAUNDERS: Okay.

THE COURT: Now you're not talking about a recognized foreign company. You're now talking about what actually happened in the contractual nexus here. Let's move to that issue.

It seems to me at the end as a tentative holding I will rule that the mere fact that Ford may have been a registered foreign company, Ford Motor Company, and thereby that it may have become a juristic person under Taiwanese law does not necessarily cause it to be liable for contractual acts of its subsidiary.

MR. SAUNDERS: Well, article 23 says that.

THE COURT: Where does it say that?

MR. SAUNDERS: Article 23, which is attached to tab 22 of Mr. Levin's initial moving papers.

THE COURT: Tab 22?

MR. SAUNDERS: It's actually the last page of the entire document.

THE COURT: Is that Exhibit I?

MR. SAUNDERS: No. It's actually—I don't know if you're looking at the same document, your Honor. The side tabs.

THE COURT: Plaintiff's documents. Just a minute.

You're now asking me to look at the affidavit of Tai Yun Lee?

MR. SAUNDERS: No, your Honor. It's the notice of motion.

THE COURT: That's tab 22?

MR. LEVIN: You're correct. Your Honor, it's the last page on our moving papers.

THE COURT: Let me struggle through with Mr. Saunders. You'll have your time.

MR. SAUNDERS: Are we on the same page, your Honor?

THE COURT: I'm looking at the affidavit of Tai Yun Lee.

MR. SAUNDERS: That's correct, your Honor.

THE COURT: You want me to turn to the last page?

MR. SAUNDERS: The very last page.

THE COURT: The very last page is article 8. Here is article 23.

MR. SAUNDERS: 23 at the bottom.

THE COURT: Which provides, "If, in transacting business, the responsible person or persons of a company cause any damage to any third person as a result of the violation of any applicable law or regulation, such responsible person or persons shall be liable jointly and severally to the company of the third person for such person's damages."

What about this clause that supports your proposition that Ford Motor Company is necessarily liable every time its subsidiary makes a contract?

MR. SAUNDERS: Well, one of the things is that Ford caused Ford Lio Ho to breach the agreement, No. 1.

THE COURT; Sorry?

MR. SAUNDERS: Ford caused Ford Lio Ho to breach the agreement, No. 1. No. 2 is that the way article 23 is set up, which we've just read here, as we understand it, that Ford, after it acquired 70 percent of the shares of Ford Lio Ho, designated proxies and as its proxies the director of finance and president of Ford Lio Ho.

THE COURT: It designated whom?

MR. SAUNDERS: The president and director of finance of Ford Lio Ho as its proxies.

THE COURT: How did it do that?

MR. SAUNDERS: It did that through a power of attorney.

THE COURT: What else? Any other arguments?

MR. SAUNDERS: Also—that's it, your Honor.

THE COURT: Those two things, Ford Motor Company caused its subsidiary to make this contract with your client, and, second, that Ford Motor Company designated the president and the director of finance as its proxies through powers of attorney given to them?

MR. SAUNDERS: Correct, in accordance with article 435 of the ORC [sic] company law.

THE COURT: What is article 435?

MR. SAUNDERS: That provides the designation when it filed—

THE COURT: I can't hear you.

MR. SAUNDERS: Article 435 provided designation when it filed, when Ford filed its foreign nationals investment application by granting a power of attorney.

THE COURT: I still don't understand you. Where do I find 435? In proving foreign law, you can't expect, especially with a jurisdiction like Taiwan, that the Court can have familiarity unless the relevant statutes are set out in full, or in relevant excerpts.

Mr. Saunders, 435 is not cited in your expert's affidavit.

MR. SAUNDERS: No, it is not, your Honor.

THE COURT: I don't readily see it in the affidavit of Tai Yun Lee, or reply affidavit. I could be wrong. And I can't take it into consideration. The fact that Ford Motor company designated certain people to be its proxies through a power of attorney is not conclusive on this issue. I think you should now talk to me about what Ford did through negotiations or otherwise that caused it, Ford Motor Company, to be liable for a contract plainly made with the subsidiary, the subsidiary of the defendant in this lawsuit, the company Ford Lio Ho Motor Co., Ltd.

MR. SAUNDERS: Your Honor, what they basically did is that they basically controlled and dominated Ford Lio Ho. The first thing they did is that Ford negotiated the contract between ICA and what was originally Ford and then at the last minute switched over to Ford Lio Ho.

THE COURT: But the truth is that your client signed the contract not with Ford Motor Company but with Ford Lio Ho Motor Co. I'm looking at your complaint and the attachment to your complaint, on page 5, which has the execution. It shows the execution of your client's president and it shows the execution of the president and it shows the execution of the president—I can't read the handwriting.

Mr. Levin, would you read into the record who signed for Ford Lio Ho Motor Co. Ltd.?

MR. LEVIN: I will attempt to do so. Hexter.

THE COURT: What was his title?

MR. LEVIN: I don't recall offhand, your Honor.

THE COURT: Can either of you read it?

MR. LEVIN: I can't.

THE COURT: Title seems to be president.

MR. LEVIN: I don't believe he was the president.

THE COURT: Mr. Saunders, your client was there. Who was it that your client appreciated signed this contract for Ford Lio Ho Motor Co.?

MR. SAUNDERS: It was signed by Mr. Hexter, at the time, a Mr. Auton was the president of Ford Lio Ho, a Ford employee who was appointed president at Ford Lio Ho. Mr. Hexter signed the agreement on his behalf, also a Ford employee.

THE COURT: It says GK Hexter. Then it's crossed out after that. Below that, title, it says president and something else. Mr. Gelber, if you wish to speak, you can speak.

MR. GELBER: Thank you, your Honor. I was the original author of the complaint in this matter. When my law firm folded, the matter was accepted by the Munzer & Saunders firm. It was signed by Mr. Hexter on behalf of Mr. Auton. Both Mr. Hexter and Mr. Auton at the time were employees of Ford.

THE COURT: Can you read out what it says?

MR. GELBER: "G. K. Hexter for," and then it has the first two initials, which I can't read, of Mr. Auton. It was Ford company policy, oddly enough, to address everybody by their first two initials so the record will be replete with people's initials.

THE COURT: So Mr. Hexter signed for Mr. Auton?

MR. GELBER: Right, who was the then president.

THE COURT: And do you understand that the seal above the line of Ford Lio Ho Motor Co., Ltd. Taiwan was the seal of the Ford Motor Company?

MR. GELBER: I will confess I have no idea what it is. It appears to be.

THE COURT: If I take that inference, it will be a reasonable inference?

MR. GELBER: I don't think it's unreasonable. I don't know if it's a government seal, a corporate seal, or a personal seal of some sort.

THE COURT: But the bottom line, and I don't know whether Mr. Saunders will carry on the argument now or Mr. Gelber, whoever it is, but let it be one of you now. Who wants to do it?

MR. GELBER: I'll try to answer a few questions, your Honor. I'm very familiar with the facts of the case.

THE COURT: All right, Mr. Gelber.

MR. GELBER: Thank you, your Honor.

THE COURT: It's a natural inference that I take that your client knowingly signed this contract with Ford Lio Ho Motor Co. Ltd. and executed the contract with that company and that's the only company that is named in the agreement, and there is no guarantee of the parent. Is there?

MR. GELBER: That's incorrect. Part of what the Court is describing is incorrect. Mr. Borros, who is the president of ICA, did sign with Ford Lio Ho at the express request, and over Mr. Borros' objection, of Ford Motor in Dearborn.

THE COURT: Whoever asked about it, whoever negotiated it, whoever said something about it, the fact of the matter is that only Ford Lio Ho—

MR. GELBER: Signed.

THE COURT: —signed, right?

MR. GELBER: Correct, although that's arguable because both Mr. Hexter and Mr. Auton were employees of Ford Motor.

THE COURT: But they signed?

MR. GELBER: They did, correct.

THE COURT: On behalf of the subsidiary?

MR. GELBER: Correct.

THE COURT: Were they also officers of the subsidiary?

MR. GELBER: I believe they were expatriate officers of the subsidiary.

THE COURT: Patriae or expatriate?

MR. GELBER: Correct. The contract, however, does reference Ford Motor, the parent.

THE COURT: Only in one connection and that is the corporate policy of the parent corporation regarding the illegality of illegal payments and the strict requirement that people observe American law with regard to forbidding illegal payments.

MR. GELBER: The contract has to be conducted in all respects in full compliance with Ford corporate policy because the bottom line—

THE COURT: What says that?

MR. GELBER; The policy letter, C2, as I recall.

THE COURT: Let's be specific.

MR. GELBER: C3. Excuse me.

THE COURT: You're looking at paragraph 2D and it's reference to the corporation's policy C3.

MR. GELBER: Right.

THE COURT: Your argument is that that reference is the policy of Ford Motor Company?

MR. GELBER: Oh, absolutely.

THE COURT: But can it also be the policy of the subsidiary of Ford Motor Company?

MR. GELBER: The answer to a question framed like that always has to be yes. But it is Ford Motor's, the parent's, policy. They dictated it.

THE COURT: It just says Ford, if you look at C3.

MR. GELBER; Succeeding even to divide Ford Motor Company must have the trust and confidence of as many public—it doesn't say Ford Lio Ho. It's Ford.

THE COURT: Right.

MR. GELBER: And it goes on, no other conclusion can be reached when you read this that we're talking about the parent Ford. It's signed by Henry Ford, II, chairman of the board.

THE COURT: Apart from this one document that sets out the policy of Ford Motor Company for itself and all its various manifestations regarding the impropriety of illegal payments, is there anything else in the contract?

MR. GELBER: Yes. My recollection is that there is a clause in the contract that expressly states and makes reference to actual benefits to Ford itself.

THE COURT: Show me the reference.

MR. GELBER: I know that's there because we also reference it in our brief.

Part of the problem is corporation, which is the term used throughout the contract, in some instances because it's defined at the beginning as Ford Lio Ho, but in one or two other instances it makes reference to Ford, and I will find that for you. Well, here, for example, consultant warrants, right there in 2D, consultant warrants that its performance hereunder shall comply with corporation's policy C3.

THE COURT: Anything else? We covered that.

MR. GELBER; But the significance there is the identity. The argument here is that Ford Lio Ho was really a puppet on strings of the parent company Ford and they were used interchangeably.

THE COURT: That's your conclusion. Is there anything else in this document which supports your proposition that the primary purpose of this document was to benefit the parent and not the subsidiary?

MR. GELBER: Well, yes. The bottom line flow-through. It's Ford Motor that's selling its cars. There's nobody else who is making these cars. These are Ford cars, the parent Ford's profitability on these cars is a function of the markup that it can charge the customers and the Customs duties it has to pay, the bottom line profit. This whole agreement is to benefit Ford.

THE COURT: Wouldn't that argument void the separateness of any subsidiary created by Ford Motor Company to deal with its automobiles?

MR. GELBER: No. It would depend on the circumstances.

THE COURT: What are the—

MR. GELBER: In this particular issue, what happened was this. This fellow Lesley Borros, who had this company, ICA, was soliciting business. He was hawking Ford, making them crazy, sending them letters and getting ignored. And then one day Ford says, What have we got to lose? They set him up with representatives, next thing he knows he's negotiating with employees in Taiwan.

THE COURT: Don't be glib because it's very important to identify who. You're saying and your complaint alleges that Ford Motor Company turned your client down.

MR. GELBER: Right, initially.

THE COURT: Initially.

MR. GELBER: Right.

THE COURT: And then the negotiations went on.

MR. GELBER: Right.

THE COURT: With various people. You don't identify whether those people were also employees or officers of the subsidiary.

MR. GELBER: I believe the transcripts of the depositions taken in the case identify those people. I cannot put my finder on it at this moment, but for the sake of the fluidity of the presentation—

THE COURT: But the critical point in my judgment is who signed the contract and that signature and clearly the wording of the contract relates to the subsidiary. So the burden you have undertaken, Mr. Gelber and Mr. Saunders, is to argue that you are entitled to go to the jury under Taiwanese law on the issue of the proper piercing of the corporate veil, either under an alter ego theory or some theory of fraud, based upon a rather conclusory and inadequate expert's affidavit of your Taiwanese law.

MR. GELBER: This is an interesting point. The whole issue of alter ego liability and piercing the corporate veil liability may also actually be in this particular case a red herring, and I say that because it assumes in order to have something pierced, it assumes that there is a protection offered. And by reading article 23 that we just read into the record and understanding Ford's role, and if you look at even the affidavits that Ford has presented of its experts, you see that the statutory scheme of Taiwan makes references to general, what we might call Eastern principles of thought. They talk about doing right, moralistic behavior, concepts that in an American statute would be considered too loose to be enforceable, but in the context of Taiwan propounds a personal responsibility on those who it perceives as the actors in any event. And Taiwanese law basically says straight out that you're liable, not that through some mechanical procedure, a corporate protection can be pierced to get to somebody who is not otherwise liable.

If I may, with the Court's permission, must to back up and respond to the Court's earlier question, because I think the Court raised the question of what it would do under theory if it applied New York law. The Court of Appeals in New York, when faced with these kinds of issues, applies an interest analysis, which Mr. Saunders touched upon. But the interest analysis here is you have a New York corporation that was essentially destroyed by—now, we don't plead fraud, but how could it be anything other than that when Ford says, look, come to Taiwan—

THE COURT: If you haven't pled fraud with specificity, don't rely on fraud.

MR. GELBER: I apologize. Ford says, look, our lawyers, Lee & Lee, have failed to eliminate this upward valuation that is now being imposed on the Sables for the first time. You signed a contract with us. We want you to go to Taiwan to help us. Ford calls him, Ford Motor Dearborn calls Lesley Borros, says meet with these people, Mr. Hexter and others, we'll pay your fare.

So at the express request of Ford, Mr. Borros travels with a team to Taiwan, using their skills, and effectuates this reduction which inures to the benefit of Ford Motor. If you picked up a copy of Ford Motor's annual report for any year, the flow-through to Ford Motor is clear from Ford Lio Ho. There is no separation.

THE COURT: That's not an important thing.

MR. GELBER: Okay.

THE COURT: It all depends on the separateness of the subsidiary. You haven't told me anything that the subsidiary is not a separate corporation.

MR. GELBER: With respect to the sale of the Sables—well, part of the problem of proof is failure to produce document by Ford.

THE COURT: This is not the place to tell me about that.

MR. GELBER: Okay. There is a dispute.

THE COURT: You have had remedies in connection with that previously.

MR. GELBER: Okay. There is a dispute at present over the control that Ford exercised. We allege, and I don't think they dispute, that virtually every aspect of Ford Lio Ho's pricing, interaction with other suppliers, the amounts it needs to pay, its account procedures, who it could hire as accountants, who paid the salaries of Ford Lio Ho officers all reflect back on Ford.

THE COURT: Let me ask you this. Were the prices set by the officers of the subsidiary?

MR. GELBER: No.

THE COURT: Who set the prices?

MR. GELBER: Ford.

THE COURT: What proof do you have of that?

MR. GELBER: Those are on the invoices. As a matter of international law, Ford sets what are known as the intercompany prices.

THE COURT: So it sets the price which you say the subsidiary may sell?

MR. GELBER: No.

THE COURT: Or it sets the price that it sells to the subsidiary?

MR. GELBER; The invoices reflect the price that it sells to the subsidiary. It then controls the price at which the subsidiary must sell.

THE COURT: By what, controlling the markup, defining the markup?

MR. GELBER: Correct.

THE COURT: You say it controlled the choice of accountant. Was that a decision by the board of directors of the subsidiary or officers of the subsidiary?

MR. GELBER: Originally Ford Lio Ho had a company called T. N. Song as auditors. Ford said no, you cannot continue to use them; you must use Coopers & Lybrand. This is derived from deposition testimony.

THE COURT: Did the choice of the hiring of Coopers & Lybrand then follow from an act of the directors of the subsidiary?

MR. GELBER: It followed from—all right, here's the question. This is the affidavit—excuse me, the deposition of Mr. Hexter. It's his response to written deposition questions. And the question, it's Exhibit D to the declaration of Craig Saunders at page 30 to Exhibit D, and the question, No. 109, is : "Who decided, if anyone, to replace T. N. Song & Co. as Ford's auditors with Taiwanese branch office? Please explain in detail." And Mr. Hexter says: "It was my—"

THE COURT: I'm reading now. "It was my intention to replace T. N. Song & Co. as Ford Lio Ho's auditors," and the background was this request made to him by the parent corporation.

MR. GELBER: Right.

THE COURT: Anything else? Who paid the salaries?

MR. GELBER: Right. Ford paid, Mr. Longhurst, who was another player, another expatriate Ford employee who worked at Ford Lio Ho testified that even though he worked in Taiwan, Ford Motor Dearborn paid a substantial amount of his salary. Hexter stated that at least 40 percent of his salary was paid by Ford and this occurs in deposition.

THE COURT: These gentlemen were employees of both the subsidiary and the parent, is that right?

MR. GELBER: I guess that's correct.

THE COURT: Anything else you've got to tell me?

MR. GELBER: In response, I'll answer any question.

THE COURT: The question is what you argue in support of your proposition that Taiwanese law commands or raises as an issue of fact whether Ford Motor Company should be liable for the breach of contract allegedly made by its subsidiary.

MR. GELBER: Sure. Yes, there's two things. First, it cannot be reasonably argued that Ford did not control Ford Lio Ho. For example, as Mr. Hexter testified, as did Mr. Ingles testify, Ford Dearborn determines the accounting practices that Ford would employ. For example, all its costs, expenses, income accounts had to be prepared in accordance with Ford's procedures and Ford Lio Ho had no choice in the matter.

THE COURT: To facilitate the preparation of a consolidated return by the parent.

MR. GELBER: Ford Lio Ho had no say.

THE COURT: Anything else?

MR. GELBER: It cannot be reasonably argued that Ford Dearborn did not control Ford Lio Ho.

THE COURT: You just said that.

MR. GELBER: In Taiwanese statute, that's Section 23. It also cannot be disputed that it was Ford Dearborn—actually, it was Ford Dearborn and Ford Japan, which is a whole other issue, that simultaneously directed ICA to desist its efforts and Ford Dearborn through Ford Lio Ho notified ICA that not only should it stop its efforts but that it wasn't going to pay it anymore, that it was just going to meet its expenses. If you look at the Taiwanese statute—

THE COURT: What's the support for that last proposition, that it was an instruction by Ford Motor Company to ICA or to, what, the subsidiary? Let me withdraw that. Who gave your client instructions not to go to Washington?

MR. GELBER: The not to go to Washington thing is another issue. That was various people. That was Ford, that was Ford Japan and also Ford Lio Ho, from what I understand.

THE COURT: But it was Ford Lio Ho.

MR. GELBER: Ford Lio Ho was one of the people.

THE COURT: Let me ask you this other question. You said to desist efforts.

MR. GELBER: Right.

THE COURT: I don't know what efforts you were talking about.

MR. GELBER: Right.

THE COURT: I don't know what efforts you were talking about.

MR. GELBER: The efforts to achieve further reductions in Customs valuation.

THE COURT: Who told you not to do that?

MR. GELBER: Ford.

THE COURT: Which Ford?

MR. GELBER: Ford Dearborn.

THE COURT: Ford Lio Ho also?

MR. GELBER: I don't know the answer to that. It was Ford Dearborn and Ford Japan.

THE COURT: But also Ford Lio Ho?

MR. GELBER: I don't know the answer to that. It's possible. But I understand it was an instruction directed by Ford Dearborn and Ford Japan.

THE COURT: Anything else?

MR. GELBER: Yes. Seven of the ten members of the Ford Lio Ho board of directors were Ford employees.

THE COURT: Anything else?

MR. GELBER: Yes. I think the Court should consider also that the president of Ford Lio Ho, who was an employee of Ford, had no authority to act independently on behalf of Ford Lio Ho.

THE COURT: How do you know that?

MR. GELBER: There was Exhibit D, page 27 to the Saunders declaration. There was testimony about that to the effect that Mr. Auton could not negotiate with Fiat or BMW in order to import or sell their cars without the approval of Ford.

THE COURT: Is that the only instance where you say there was control?

MR. GELBER: I think there were multiple instances; I was just giving the Court an example.

THE COURT: Ford was instructing its subsidiary that it shouldn't take on obligations with respect to competitive automobiles.

MR. GELBER: I don't know what it was about taking on obligations; it was about just conducting business. Arguably, you could frame that as taking on obligations, but question 100 on page 27 of Exhibit D, and the following questions, result in—

THE COURT: Okay, I see it.

MR. GELBER: —in those responses.

THE COURT: I see.

MR. GELBER: So the final thing is that if you look at the statute, that Section 23, Section 23 that we referred to, obviously Ford took it upon itself to be a responsible person. If it was directing the accounting procedures, if it was directing the negotiating capability of the officers who were its employees, if it seated seven of the ten members of the board of directors, Ford clearly was a responsible person in that Ford directed, caused, or otherwise effectuated the breach of the contract in is refusal to pay our client. Ford was a responsible person as defined in—it's clear on the face of the statute, and that statute says there is direct responsibility. That's why I stated that while I appreciate the arguments for alter ego liability and piercing the corporate veil they may in fact be red herrings because Taiwanese law on is face imposes that responsibility directly, particularly on an entity like Ford.

THE COURT: Thank you, Mr. Gelber.

MR. GELBER: Thank you, your Honor.

THE COURT: Mr. Levin, let me ask you to direct your comments to those made just now by Mr. Gelber. Was Ford Lio Ho a separate company?

MR. LEVIN: Indeed it was, your Honor.

THE COURT: To what extent was it controlled by Ford Motor Company?

MR. LEVIN: It was an independent entity and to the extent—it was not controlled to the extent that would give rise to a merging of the two entities. There was nothing done and nothing has been pointed out by plaintiffs that would destroy the separateness of their subsidiaries.

THE COURT: Is their any proof that when it conducted business it conducted business not for itself but for Ford Motor Company?

MR. LEVIN: I don't believe so, your Honor.

THE COURT: When there was an instruction to the plaintiff to desist efforts, was there an instruction to that effect given by the subsidiary?

MR. LEVIN: I believe so, your Honor. As a matter of fact, your Honor, I believe there's a document, see if I can find it. My apologies, your Honor. It does not seem to be annexed.

THE COURT: Let's look at the affidavit of Jin Fang Pun. This is Exhibit C of the plaintiff's papers.

MR. LEVIN: Well, the first thing, I'm glad your Honor asked me about this. This is plaintiff's expert, this affidavit.

THE COURT: That's right.

MR. LEVIN: This affidavit is based upon a fact which has not been proven.

THE COURT: Which one?

MR. LEVIN: No. 1, Ford Motor Company is a recognized foreign company with MOEA certificate of authorization and a juristic person in ROC.

THE COURT: If I accept the proposition that I expressed in questioning Mr. Saunders, does that make any difference to your case?

MR. LEVIN: No.

THE COURT: So what if it is a juristic person?

MR. LEVIN: It does not make any difference.

THE COURT: Why do we need to argue that point?

MR. LEVIN: Right.

THE COURT: Let's look at paragraph 3 on page 2.

MR. LEVIN: I have it, your Honor.

THE COURT: Ford Motor Company, after acquiring the majority of shares of Ford Lio Ho, did designate its proxies to be the president and the director of finance of Ford Lio Ho. Assuming that those people, as appears to be the fact, then became officers and employees of the subsidiary, does the rest of the argument of Mr. Jin Fang Pun state a correct proposition of law?

MR. LEVIN: It does not, your Honor, and that has been addressed by the reply affidavit of Mr. Lee, which we have submitted.

THE COURT: You're referring me to paragraphs 17 and 18, are you not?

MR. LEVIN: I believe so, your Honor.

THE COURT: Your expert states, and your expert is Tai Yun Lee. Do I refer to him as Mr. Tai or Mr. Lee?

MR. LEVIN: He refers to himself in English, your Honor, as Mr. Lee.

THE COURT: All right.

MR. LEVIN: So I'm not sure what's correct.

THE COURT: Let's follow that. Mr. Lee states that and attaches the text that a proxy under article 177 of the Taiwan company law refers to a person authorized by shareholders to attend a shareholder meeting. And that attachment is attached. And then he goes on in paragraph 18 to say, "ICA correctly states that under article 23 of the Taiwan company law, if a responsible person of a company shall act contrary to the law, causing damages to another person, the end company are liable. However, Ford is not a responsible person under the Taiwan company law and cannot be held liable for Ford Lio Ho under article 23 of the Taiwan company law. A responsible person is defined by article 8 of the law, meaning a director, board member, managerial officer, liquidator, promoter, supervisor, auditor, reorganization manager, or reorganization manager, or reorganization supervisor in a case of a company limited by shares which is the case of Ford Lio Ho."

And he concludes on the basis of the statutes that he's attached that Mr. Hexter, who was hired by Ford Lio Ho, was an employee and held the title of director of finance not as a director referred to in article 8 of the Taiwan law.

It seems to me that the conclusory, and I find, inadequate affidavit of Mr. Jin Fang Pun speaks to the proposition that a representative of a registered foreign company, assuming that Ford Motor Company is one, while conducting business of that registered foreign company may create liability for that registered foreign company but if that person is also an employee or a director or a representative of a separately incorporated subsidiary, as is the case here, and it is common in this country, the acts attributable to that agent are attributable to the principal for which that agent acts. That's true as a normal instance of corporate law. It's true in the instance of Taiwanese law.

Nothing in your affidavit, Mr. Saunders, has given me anything different. And I therefore rule that from the information given to me about Taiwanese law that there was not intended to be a liability created for Ford Motor Company. The acts of the parties that were involved here are acts under a contract that was made between representatives of the subsidiary, Ford Lio Ho Motor Co. Ltd., Taiwan, the corporation, and the plaintiff. The recitals in that contract are recitals relating, except for the one instance that was mentioned in terms of the policy about illegal payments, were acts and terms and conditions relating to the subsidiary. Nothing sufficient has been shown to show that Taiwanese law, on the basis of the acts mentioned, would allow a piercing of the corporate veil.

Indeed, the substance of Mr. Tai Yun Lee's affidavits are persuasive that there would not be an appropriate piercing of the corporate veil in these instances. I therefore hold that

Ford Motor Company is not a proper defendant in this lawsuit and I dismiss it. I grant the motion for judgment not on the pleadings but for judgment under Rule 56. Thank you very much.

MR. LEVIN: Thank you, your Honor.

UNITED STATES DISTRICT COURT
SOUTHER DISTRICT OF NEW YORK
------------------------------------------------X

| | |
|---|---|
| INTERNATIONAL CUSTOMS<br>ASSOCIATES, Inc.,<br>Plaintiff, | 94 Civ. 7173<br>(AKH) |
| -against- | ORDER |
| FORD MOTOR COMPANY,<br>Defendant. | |

------------------------------------------------X

ALVIN K. HELLERSTEIN, UNITED STATES DISTRICT JUDGE:

By notice of motion dated October 9, 1998, defendant moves for summary judgment. Oral argument was held on April 23, 1999. For the reasons stated on the record at the hearing, the motion is granted and the complaint is dismissed. The Clerk of the Court shall mark this matter closed.

Dated: New York, New York
April 26, 1999

ALVIN K. HELLERSTEIN, U.S.D.J.

It is ORDERED that counsel to whom this Order is sent is responsible for faxing a copy to all counsel and retaining verification of such in the case file. Do not fax such verification to Chambers.

## APPENDIX C

99-7644.sum

## UNITED STATES COURT OF APPEALS
## FOR THE SECOND CIRCUIT

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 29th day of December, one thousand nine hundred and ninety-nine.

PRESENT: HON. THOMAS J. MESKILL,
HON. DENNIS JACOBS,
HON. PIERRE N. LEVAL,
Circuit Judges.

- - - - - - - - - - - - - - - - - - - - x

INTERNATIONAL CUSTOMS ASSOCIATES, INC.,

Plaintiff-Appellant,

LESLIE L. BOROS,

Plaintiff,

-v.- 99-7644

FORD MOTOR COMPANY,

Defendant-Appellee,

FORD LIO HO MOTOR CO., LIMITED (TAIWAN),

Defendant.

- - - - - - - - - - - - - - - - - - - - x

APPEARING FOR APPELLANT:
STEVEN A. FELDMAN, Roslyn, NY
(Feldman & Feldman, on the brief).

APPEARING FOR APPELLEE:
HAMILTON P. FOX, III, Washington,
DC (Robert W. Clark, III,
Sutherland Asbill & Brennan,
Washington, DC, Michael J. Levin,
Menaker & Herrman, New York, NY, on
the brief).

Appeal from a final judgment entered on April 30, 1999 in the United States District Court for the Southern District of New York (Hellerstein, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the final judgment is AFFIRMED.

International Customs Associates, Inc. ("ICA") appeals from the district court's dismissal of its complaint against Ford Lio Ho Motor Co., Limited ("Lio Ho") and Ford Motor Company ("Ford"), which owns approximately 70% of Lio Ho. In the complaint, ICA sought damages from both defendants for breach of a consulting contract signed by Lio Ho and ICA. The district court dismissed the action as to Lio Ho for lack of personal jurisdiction pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure. The district court subsequently granted summary judgment to Ford pursuant to Rule 56 of the Federal Rules of Civil Procedure, finding that Taiwanese law did not allow piercing of the corporate veil on the basis of the acts alleged.

Upon consideration of ICA's arguments, we affirm the district court's dismissal of the action as to Lio Ho for substantially the reasons stated by the district court. *See International Customs Assocs., Inc. v. Ford Motor Co.*, 893 F.Supp. 1251, 1258-63 (S.D.N.Y. 1995). We also affirm the dismissal of the action as to Ford for the reasons stated by Judge Hellerstein on April 23, 1999. The additional Taiwanese law provided by ICA on appeal does not support a contrary finding.

The judgment of the district court is hereby AFFIRMED.

EXHIBIT D-1

THE WHITE HOUSE

Office of the Press Secretary

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For Immediate Release August 1, 1986

August 1, 1986

MEMORANDUM FOR THE UNITED STATES TRADE REPRESENTATIVE

SUBJECT: Determination under Section 301 of the Trade Act of 1974

Under Section 301 of the Trade Act of 1974, as amended (19 U.S.C. 2411), I have determined that use of a duty paying system to calculate customs duties by the authorities on Taiwan violates a trade agreement and is unjustifiable and unreasonable and a burden or restriction on U.S. commerce. Under Section 301 of the Trade Act, I have determined to retaliate commensurately against Taiwan so long as it fails to meet its obligations in this regard and am directing the United states Trade Representative to propose an appropriate method for such retaliation.

## Reasons for Determination

In 1979 the United States and many trading partners concluded a trade agreement, the Customs Valuation Code, specifying the way in which imports are valued for purposes of calculating customs duties. That agreement allows developing countries to delay their implementation of it for a specified time period.

Through a bilateral exchange of letters, Taiwan agreed in 1979 to observe obligations "substantially the same" under this agreement as those applicable to developing countries. This means it should have implemented those obligations effective January 1, 1986.

It did not. In February it agreed to meet this obligation by July 1, 1986. Instead, it enacted a law effective July 1 under which its customs authorities calculate duties upon the basis of a duty paying system (under which values of import items are determined administratively), rather than upon "transaction value" (ordinarily the invoice price). This practice is inconsistent with Taiwan's agreement to apply "substantially the same" obligations as set forth for developing countries in the Customs Valuation Code.

I have made these determinations and directed the United States Trade Representative to propose appropriate retaliation to enforce U.S. trade rights and to respond to the Taiwan practices in question. I would strongly prefer that Taiwan adhere to its agreement to apply the Customs Valuation Code.

This determination shall be published in the Federal Register.

RONALD REAGAN

## APPENDIX D-2

ICA
[LOGO]
INTERNATIONAL CUSTOMS ASSOCIATES, INC.
Worldwide Customs, Trade and Management Consultants
300 Madison Avenue • New York, N.Y. 10017

August 5, 1986

Mr. William J. Caldwell
Executive Vice President &
Chief Financial Officer
Ford Motor Company
The American Road
Dearborn, MI 48121

Dear Mr. Caldwell:

It is our understanding that your company has a substantial level of importation into Taiwan.

We have prepared the enclosed "Trade Alert" in the latter part of July. Last week we have learned from our sources in Taiwan, the United States and other countries that Taiwanese Customs substituted considerably higher values for the intercompany prices of multinational corporations, and in other cases, has added "uplifts" (markups) to these intercompany prices.

Even if you find that Taiwanese Customs has not yet increased your intercompany prices for Customs Valuation purposes, this should not assure you that they will not do so. Taiwanese Customs—as all other Customs throughout the world—collects values within six months after importation under their customs laws (find a higher "reference price" under their new law; construe a higher value; etc.).

In fact, what I.C.A. offers to you is a reduction for customs value purposes from your present intercompany prices! When compared to the factual or potential increase of your intercompany prices by Taiwanese Customs for Customs Valuation purposes, your savings under I.C.A.'s proceedings can be of significant sums. We can effect similar savings in other countries for you, — but Taiwan is most timely, with comparatively very high duty rates. . .

Timeliness is of the essence; once Taiwanese Customs has finalized the customs values for your importations, these values become rather entrenched, and even we would have great difficulties in reducing these customs values. It needs to be emphasized that our fees are paid from the savings we secure for our clients.

This up-date to the attached "Trade Alert" should be most helpful to your understanding of this potential opportunity to increase your profits in Taiwan. We look forward to hearing from you.

Sincerely yours,

Leslie L. Boros
President

Encls.

cc: Mr. L. Lindsey Halstead
Vice President –
Asia-Pacific & Latin America Auto Operations

## APPENDIX D-2 (CONTINUED)

FORD
[LOGO]

R. E. Cook
General Assistant Controller
Finance Staff

Ford Motor Company
The American Road
Dearborn, Michigan 48121

September 12, 1986

Mr. L. L. Boros
President
International Customs Associates, Inc.
300 Madison Avenue
New York, New York 10017

Dear Mr. Boros:

Your letter of August 5, 1986 addressed to Mr. W. M. Caldwell (now retired from Ford Motor Company) has been referred to me for review.

We have considered your offer of services to minimize (for customs value purposes) intercompany prices for materials imported into Taiwan by Ford and do not believe that your firm could be of assistance to us at this time. Ford's affiliate in Taiwan has an excellent record of minimizing import value for customs purposes. We expect that its good working relationships with the customs authorities in Taiwan will provide continuation of this excellent performance.

We appreciate, however, your interest in Ford Motor

Company and will contact you in the future should circumstances change such that your services could be beneficial to us.

Sincerely,

(Signed by R. E. Cook)

62/58-2

cc Mr. I. M. Inglis

## APPENDIX D-3

FORD
[LOGO]

Ford Lio Ho Motor Company Ltd.

Head Office & Plant
P.O. Box 12
Ching Li, Taiwan 32042
Republic of China
Telephone: Chung Li
4553131
Cable FORDLH
Telex: 35167

December 9, 1988

Mr. Yen Lih
Director, Valuation Center
Inspectorate General of Customs
R.O.C. Customs Headquarters
4th Floor, 131 Nanking Road, Sec. 3
Taipei, Taiwan, Republic of China

Dear Mr. Yen:

In our September 15, 1988 Application letter to you, we requested that the Sable automobiles, imported by Ford Lio Ho from Ford Motor Company (U.S.) be valued by R.O.C. Customs under the Computed Value method. Our application was based upon the Customs Value presentation made on our behalf on September 13, 1988 by Ford's consultants, International Customs Associates of New York.

We consider this a very important issue. This letter again requests you to implement the Computed Value method of appraisement for our Sable importations. It is the proper Customs Valuation method. Our September 13, 1988 presentation, our application letter, and several rapidfaxes transmitted to you by our consultants since that time, fully support this position, and should be read in conjunction with this letter. Our application to implement the computed value method of appraisement, seeks only proper customs valuation treatment. It does not represent favorable treatment for Ford Lio Ho, and does not itself affect the valuation of Sables automobiles imported by independent traders (grey-market dealers) in any way.

As stated in our Application letter of September 15, 1988, and in all correspondence to you by our consultants, Computed Value is the only proper Dutiable Value for our Sable importations, under both the GATT Customs Valuation ("Tokyo Round") and R.O.C. Customs Law.

* * * * *

Yours very truly,

G. .K. Hexter
Director of Finance

cc: Messrs. In-Jaw Lai Fu-Jen Wang Leslie L. Boros

## APPENDIX D-4

ICA
[LOGO]
INTERNATIONAL CUSTOMS ASSOCIATES, INC.
Worldwide Customs, Trade and Management Consultants
300 Madison Avenue • New York, N.Y. 10017

December 14, 1988

Mr. Yen Lih
Director, Customs Valuation
Inspectorate General of Customs
R.O.C. Customs
4th Floor, 131 Nanking E. Rd., Sec. 3
Taipei, Taiwan, R.O.C.

Dear Mr. Yen:

In the past two weeks you had several discussions with Drs. Chang and Ting, as well as Ford Lio Ho managers, about the Dutiable Value of the Sable automobiles imported by Ford Lio Ho from Ford Motor Company (U.S.A.). Mr. Harry Haroian and I were informed of these discussions by Dr. Chang and Ford Lio Ho executives, and it appears to us that we might be of agreement as to the proper Dutiable Value, except that the technical application by you needs to be resolved.

As we were now informed, you told Ford Lio Ho that if an invoice is prepared in the Computed Value amount, you would then accept it as the Duty-Paying Value.

As you will recall, we have discussed this technique at our September 13th meeting. We discussed that one invoice by Ford-U.S. would be for Computed Value amount, and another for the Non-Dutiable Expenses, both included in the filing at the time of importations with R.O.C. Customs and BOFT. At the time you have requested that Ford-U.S. accomplish this separation of Computed Value and Non-Dutiable Expenses by listing these amounts separately on the same invoice (which Ford has done) effective with the September, 1988 first importation of 421 Sable cars. You considered it necessary to prepare two separate invoices.

* * * * * * * * *

Sincerely yours,

Leslie L. Boros

cc: Dr. In-Jow Lai
Messrs. Fu Jen Wang, Gary K. Hexter
Dr. Pei Yang Chang

EXHIBIT D-5

FORD
[LOGO]

Ford Lio Ho Motor Company Ltd.

Head Office & Plant
P.O. Box 12
Chung Li, Taiwan 32042
Republic of China
Telephone: Chung Li
4553131
Cable FORDLH
Telex: 35167

November 26, 1990

TO: Mr. Leslie L. Boros
President
International Customs
Associates, Inc.
Fax No. 1-212-983-0235

Ref: FIN – 314–90

Dear Leslie,

Reference your letter of November 22, 1990.

You do not appear to have received my letter of November 19 (attached) which advised that Ford management has decided not to take any further action on the Sable customs claim, and that ICA should cease any further work, effective immediately.

Please acknowledge receipt.

Your sincerely,

P. J. Daniel
0008/43

cc: Mr. W. C. Connelly
Mr. G. K. Hexter

## APPENDIX D-6-1

Aug. 30 '88 20:41 1111 FORD [3F]

FORD
[LOGO]

IN HANDWRITING

FORD LIO HO (TAIWAN)
RAPIDFAX

AUGUST 30, 1988

TO: L. L. BOROS
ICA – New York

SUBJECT: FIES & FORD WERKE PRICES

Present prices for products sold by Ford Lio Ho purchased from FIES and Ford Werke are:

* * * *

FORD WERKE CARS

SCORPIO 2.0. L. GL DM 21,316.81

* * * *

SIERRA 2.0 l. GHIA Hatchback DM 16,154.16

* * * *

## APPENDIX D-6-2

## EXPORT PRICES – BUILT UP

## FORD – SCORPIO
## TAIWAN

| FORD WERKE AG<br>Cologne–Germany | page 2<br>EFFECTIVE: JULY 27, 1992 |
|---|---|

| STANDARD VEHICLE/ENGINE | INTERCO. PRICE DM |
|---|---|
| * * * * | |
| CL 4 DOOR 2000 DOHC EFI | 17,092.16 |
| * * * * | |

## APPENDIX D-6-3

## EXPORT PRICES – BUILT UP

### FORD – SIERRA
### TAIWAN

| FORD WERKE AG<br>Cologne–Germany | page 4a<br>EFFECTIVE: MARCH 1, 1991 |
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## APPENDIX D-7

FORD
[LOGO]

Ford Lio Ho Motor Company Ltd.

Head Office & Plant
P.O. Box 12
Chung Li, Taiwan 820
Republic of China
Telephone: Chung Li
593131
Cable FORDLH
Telex: 35167

August 24, 1987

To: Mr. Leslie L. Boros
President
International Customs Associates, Inc.
Fax No. 1-212-983-0235

Dear Mr. Boros,

Firstly, please be advised that effective August 1, 1987 I replaced Mr. I. M. (Martin) Inglis as Director fo Finance, Ford Lio Ho. Let me assure you that I share Mr. Inglis' determination to realize potential duty savings through engaging your organization as consultant on such matters.

Attached is Ford's redraft of the proposed contract which incorporates the input of our WHQ lawers. Your early review and comments to this draft would be appreciated to enable finalization of this matter.

In addition, under Ford Corporate procedures, we are required to validate the creditworthiness of companies into which Ford is entering into contract. Would you please provide a copy of ICA's latest financial statements together with any credit ratings which may have been conducted by Moodys, Dun and Bradstreet, Standard and Poors, etc.

We look forward to your early response.

Sincerely yours,

G. K. (Gary) Hexter
Director of Finance
0008L

Attachments.

## APPENDIX D-8

# Law Governing the Application of Laws to Civil Matters Involving Foreign Elements

*Promulgated and enforced on June 6, 1953*

### *Article 6*

With respect to the requisites for establishing and the effect of a juristic act whereby an obligatory relation is brought about, the law to be applicable thereto shall be determined by the intention of the parties to the act.

In case where the intention of the parties is unknown, and where both of the parties are of the same nationality, the law of their country shall be applicable. If they are of different nationalities, the *lex loci actus* shall be applicable. If the act was done at different places, that place whence the notice of offer was issued shall be deemed as the place of the act. If the opposite party did not know the place whence the notice of offer was issued at the time when the offer was accepted, the place of domicile of the offerer shall be deemed as the place of act.

If the place of the act mentioned in the preceding paragraph spans over two or more countries or it does not belong to any country, the *lex loci solutionis* shall apply.

Source: A Compilation of the Laws of The Republic of China, vol. 1., Constitution, The Civil Code & Its Related Laws, The Code of Civil Procedures & Its Related Laws, Taipei, Taiwan, China, 1974., pgs. 561-563.

## APPENDIX D-9

FORD
[LOGO]

Ford Lio Ho Motor Company Ltd.

Head Office & Plant
P.O. Box 12
Chung Li, Taiwan 320
Republic of China
Telephone: Chung Li
553131
Cable FORDLH
TELEX: 35167

December 23, 1988

Mr. Yen Lih
Director, Valuation Center
Inspectorate General of Customs
ROC Customs Headquarter
4th Floor, 131 Nanking E. Road
Section 3, Taipei, Taiwan

Dear Mr. Yen:

This letter submission outlines Ford Lio Ho Motor Co., Ltd. Appeal/Protest, under the provisions of Article 23 of the R.O.C. Customs Law, against the Duty Memos issued by R.O.C. Customs at the Keelung Port of Entry for importations by Ford Lio Ho of the Ford–U.S. Sable automobiles. As previous submissions, this one is also preparted with the technical expertise of our consultants, International Customs Associates, Inc. ("ICA").

* * * * * * * * *

Mr. Yen . . . 3

We have assured you that Ford–U.S. mandates and restricts Ford Lio Ho to sell the Sables only to exclusive Ford Dealers in Taiwan—a clear restriction under the GATT Code and your

Article 12–1. Further, as we explained to you, the price from Ford–U.S. to Ford Lio Ho, as well as the Ford–U.S. controlled resale price by Ford Lio Ho to the exclusive Ford Dealers are significantly affected (influenced) by the relationship (your Article 12–1(1) and (4)). Thus, Transaction Value is invalid for the Ford Lio Ho Sable imports.

* * * * * * * * *

Sincerely yours,

G. K. Hexter
Director of Finance
0127L/3–8

Encls. - GATT Code and U.S./EEC/Japanese Customs Laws Excerpts

- U.S. Department of Commerce Telegram

- Presidential Determination Memorandum, August 1, 1986

- Ford-U.S. Separate Charges for Computed and Non-Dutiable Value

Reference List of Prior Submissions to Mr. Yen Lih

1. September 13, 1988 ICA Presentation Package
2. September 15, 1988 Ford Lio Ho Letters (2)
3. October 4, 1988 ICA Letter
4. November 7, 1988 ICA Letter

5. November 21, 1988 ICA Letter
6. November 22, 1988 ICA Letter
7. December 9, 1988 Ford Lio Ho Letter
8. December 14, 1988 ICA Letter

cc: Dr. In-Jow Lai, Director General, Department of Customs
Administration
Ministry of Finance, Republic of China,
Taiwan

Mr. C. S. Huang, Inspector General of Customs, R.O.C.

Mr. Fu Jen Wang, Section Chief, Department of Customs
Ministry of Finance, R.O.C.

## APPENDIX D-10-1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
************************************

| | |
|---|---|
| INTERNATIONAL CUSTOMS ASSOCIATES, INC.,<br><br>Plaintiff,<br><br>- v -<br>FORD MOTOR COMPANY, FORD<br><br>Defendant. | 94 Civ. 7173 (JGK)<br><br>AFFIDAVIT OF JIN FANG, PUN IN SUPPORT OF ICA INC.,'S COMPLAINT |

************************************

CITY OF TAIPEI )
SS.:
COUNTRY OF TAIWAN, )
REPUBLIC OF CHINA )

Jin Fang Pun, being sworn, deposes and says:

1. I am an attorney licensed to practice law in Taiwan, Republic of China. I am one of the partners of Chen Shyuu & Pun Law Offices with its location at 9th Fl., Rose Mansion, No.162-39, Sec.3 Shing-Yi Rd., Taipei, Taiwan, Republic of China.

2. Our opinions herein are based on the following facts which are provided by the Plaintiff, International Customs Associations, Inc.,

(1) The Ford Motor Company is a recognized foreign company with MOEA's "certificate of authorization" and a juristic person in ROC.

(2) Ford Lio Ho is a company limited by shares established and registered in accordance with ROC Company Law.

(3) Ford Motor Company acquired around 70% shares of Ford Lio Ho in 1972.

(4) The President of Ford Lio Ho is appointed by Ford Motor Company who is also the "responsible person" of Ford Motor Company in Taiwan.

(5) The Consulting Agreement for Customs Services between ICA and Ford Lio Ho is executed by Mr. Boros on behalf of ICA and Mr. Hexter on behalf of Ford Lio Ho. Mr. Hexter is the Director of Finance of Ford Lio Ho and is authorized by Ford Motor Company to be the exclusive representative for the purpose of dealing with ICA.

3. Our opinions in the case of ICA vs. Ford Motor Company according to ROC laws are as follows:

(1) The first two paragraph of ROC Company Law article 27 stipulates that:

In case the government or juristic person is a shareholder, it may be chosen as a shareholder conducting the business or elected director or supervisor, provided, that a natural person be designated as its proxy for the exercise of duties.

In case the government or a juristic person is a shareholder, its proxy may be chosen as a shareholder conducting the business of elected director or supervisor on its behalf, and in the case of several persons designated by the government or by the same juristic person as proxies, all of them may be so chosen or elected.

(2) In addition, article 23 of the same Law provides that:

If any responsible person of a company, while conducting the business of the company, should act contrary to law or any ordinance, thereby causing loss or damage to any other person, he shall be jointly liable with the company to compensate such a person.

(3) Ford Motor Company, after acquiring the majority of shares of Ford Lio Ho, did designate its proxies to be the President and the Director of Finance of Ford Lio Ho. Therefore, according to the interpretation of MOEA on June 18, 1981, Shang Tzyh No.24296, if the proxies of Ford Motor Company, while conducting business of the company, should act contrary to law or any ordinance and cause loss or damage to any other person, Ford Motor Company will be liable jointly and severally with Ford Lio Ho. This is because what the proxies has done is on behalf of Ford Motor company, so Ford Motor Company shall bear the ultimate liability.

(4) According to the courts' opinions, article 23 of ROC Company Law is only applicable in the situation that the acts of the responsible person constitute "wrongful acts".

(5) "Wrongful acts" is defined in article 184 of ROC Civil Code, which reads:

> A person who, intentionally or by his own fault, wrongfully injures the rights of another is bound to compensate him for any damage arising therefrom. The same rule applies when the injury is done intentionally in a manner contrary to the rules of good morals.
>
> A person who infringes a statutory provision enacted for the protection of others is presumed to have committed a fault.

(6) If the party's behavior of such breach of contract also constitutes a "wrongful act", there are court decisions support that the other party may claim for damages under both cause of actions.

(7) In the event ICA can prove that the proxies of Ford Motor Company caused ICA to execute the Consulting Agreement for Customs Service by any wrongful acts not to pay for the service rendered by ICA, the article 23 of ROC Company Law will be applicable, and then Ford Motor company is jointly and severally liable with Ford Lio Ho.

Sworn to in Taipei, Taiwan, Republic of China, on this 30th day of July, 1998.

/s/__________________
Jin Fang Pun

Sworn to before Yang, Jau-Gwo
this JUL 30 1998 day of
July, 1998. My commission
Expires ______________

________________________
NOTARY PUBLIC

Yang, Jau-Gwo
Notary Public, Taipei District
Court, Taiwan, Rep. of China

085995

EXHIBIT D-10-2

MOEA
[LOGO]

# COMPANY LAW

(Amended on June 25, 1997)

Industrial Development and Investment Center, MOEA

Room B, 19F., 4 Chunghsiao W. Rd., Sec. 1.

Taipei, Taiwan, Republic of China

TEL:(02)2389-2111 FAX:(02)2382-0497, 2382-0498

February 1998

Article 23

If any responsible person of a company, while conducting the business of the company, should act contrary to law or any ordinance, thereby causing loss or damage to any other person, he shall be jointly liable with the company to compensate such a person.

Article 27

In case the government or juristic person is a shareholder, it may be chosen as a shareholder conducting the business or elected director or supervisor, provided that a natural person be designated as its proxy for the exercise of duties.

In case the government or a juristic person is a shareholder, its proxy may be chosen as a shareholder conducting the business of elected director or supervisor on its behalf: and in the case of several persons designated by the government or by the same juristic person as proxies, all of them may be so chosen or elected.

The proxies mentioned in the preceding two paragraphs may, on account of their respective duties, be replaced by other designated persons to fulfill their unexpired terms.

Any restriction placed on the authority of the proxies mentioned in paragraphs 1 and 2 cannot be set up as a defence against any bona fide third person.

## APPENDIX E

## AFFIDAVIT

TO WHOM IT MAY CONCERN

The undersigned, Grant N. C. Kuang, under oath hereby deposes and says:

1. I am Grant N. C. Kuang, member of the law firm of Transpac International Law Offices, Floor 10, No. 9, Section 2, Roosevelt Road, Taipei, Taiwan, admitted 1992, Taiwan,

2. I reside at Floor 3, No. 5, Alley 17, Lane 23, Wen-Hu Street, Taipei, Taiwan,

3. I am an attorney licensed to practice in Taiwan, and as a member of the firm I represent our clients at a minimum of three trials per month in Taiwanese Courts, on issues involving contract law, general business law, and procurement law,

4. I received my LL.B. from the Department of Law, Political College, Taipei (1970), my LL.M. in International Business Transactions from Cornell University (1985) and attended U.S. JAG School (1978), where I concentrated on Government Contract-Procurement Law,

5. I have my certificates in Joint Venture Management from Euromoney Legal Training (1998); in Fair Trade Law Research from the Executive Yuan (1997); and in Negotiating and Drafting International Commercial Contract from The Study Group (1995),

6. Based upon my large experience as a trial attorney, and upon my study of the laws and rules of the court, I affirm that the information I give in this affidavit is a true and accurate statement of the nature of the trial process in the courts of Taiwan,

7. The court requires the payment by plaintiff of a 1% fee of the amount of plaintiff's claim and 5% annual statutory interest, in order to place the issue before the court for adjudication, and on appeal the court fee is increased to 1.5% at each level of the appeal,

8. The Judge investigates and handles the facts, and there is no jury or jury system,

9. The court does not have the absolute power to subpoena witnesses in civil and commercial action, but can only notice or invite parties and their witnesses to present before the court,

10. The Judge questions the persons, and the attorneys cannot examine or cross-examine the persons currently,

12. The lawyers may suggest questions or lines of questioning to the Judge, but the Judge can disregard the suggested questions,

13. Only lawyers that are Chinese, and are admitted in Taiwan are allowed to represent clients in court, and foreign lawyers are excluded from participating in the pre-trial and trial process, or submitting any written arguments,

14. The trial is conducted in the Chinese language only, and all documents must be written in and translated into the Chinese language,

15. Our country is not a signatory to the Hague "Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters",

16. The court does not likely issue any written deposition questionnaires or interrogatories to any person in or outside of Taiwan. The Judge personally questions witness who voluntarily come to the Court for questioning. The witness comes to the court at wish,

17. The lawyers are not permitted to send or serve any written deposition questionnaires or interrogatories to any person in or outside of Taiwan,

18. No affidavits are accepted by the Judge in Taiwanese court proceedings,

19. Trials are not held on consecutive days, but intermittently over considerable periods of time, based on the convenience of the court, and the schedule of the witnesses,

I swear the above is a true and accurate statement, and in witness whereof I execute this affidavit under oath below:

Executed this seventeenth day of May, in the year 2000.

/s/__________________
Grant N. C. Kuang, Esq.

Signed in the Presence of
(Chinese characters)
(Signature)
Chao, Chin-Min
Notary Public, Taipei District
Court, Taiwan, Rep. of China
Case No.
105025   May 19, 2000
[Handwritten] Note. The paper contains the signer's personal opinion only.
[By this note the Court is stating it is acting as Notary only.]

## APPENDIX F

## CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION, AMENDMENT V

No person shall...be deprived of life, liberty, or property, without due process of law....

UNITED STATES CONSTITUTION, AMENDMENT VII,

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved....

28 USCA Sec. 1254

Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;....

Fed. R. Civ. P. 12(b)

Rule 12. Defenses and Objections–When and How Presented–By Pleading or Motion– Motion for Judgment on Pleadings....

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process,

(6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Fed. R. Civ. P. 15(a) Amendments. ....Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.... (b) Amendments to Conform to the Evidence. ....When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues....

Fed. R. Civ. P. 56(c) Motion and Proceedings Thereon. ....The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law....

N.Y. CPLR Sec. 302(a)

§ 302. Personal jurisdiction by acts of non-domiciliaries. (a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or....